S. HRG. 106–1029

ALLOWING CAMERAS AND ELECTRONIC MEDIA IN THE COURTROOM

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

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ALLOWING CAMERAS AND ELECTRONIC MEDIA IN THE COURTROOM

WEDNESDAY, SEPTEMBER 6, 2000

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:03 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Also present: Senators Specter, Schumer, and Feingold.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I would call the Subcommittee on Administrative Oversight and the Courts to order.

Before I make a few opening comments, Senator Schumer is going to be a little bit late and so wherever we are in testimony and if he wants to speak at that point, I would ask him to make his opening comments at that point. Somewhere along the line, we are going to have Senator Specter come to introduce and comment on his constituent who is with us today, and we have Senator Feingold from the State of Wisconsin here and he will make an opening statement.

I want to say good afternoon to everyone. Today, we are convening this hearing on S. 721, which we refer to as the Sunshine in the Courtroom Act. This bill makes it easier for every American taxpayer to see what goes on in the Federal courts, which obviously the taxpayers fund. The bill, which I introduced with Senator Schumer of New York, would allow photographing, electronic recording, broadcasting, and televising of Federal court proceedings.

Helping the public to become well informed about the judicial process will result in a healthier judiciary, and I believe a better country. On the other hand, more public scrutiny will bring about more accountability and help judges to do a better job.

As Thomas Jefferson said, "The execution of the laws is more important than the making of them." Because Federal court decisions are often far reaching and often the final statement of our law, it is critical that judges operate in a manner that provides the greatest accountability. We need to let the sun shine in on our Federal courts.

In addition, allowing cameras in the Federal courtrooms is consistent with the Founding Fathers' intent that trials be held in

front of as many people as choose to attend. I happen to believe that the First Amendment requires that court proceedings be open to the public and, by extension, the news media. The public's right to observe judicial proceedings firsthand is hardly less important. Put differently, the Supreme Court has said, "What transpires in the courtroom is public property."

An examination of the 47 States that allow cameras in State courts reveals that still and video cameras can be used without any problems, and procedural discipline has been preserved. My own State of Iowa has operated successfully in this open manner for now 20 years.

The arguments against cameras in the Federal courtrooms are easily countered, and I am glad to counter them. First, we hear that cameras brought about the disastrous O.J. Simpson case. Of course, the Simpson case was very unique, and arguably the fact that cameras allowed the public to see a judge lose control of the trial gave most people a very different understanding of what went on in that case than if they had not been able to witness the evidence themselves.

Another reason for opposition is concern about witnesses' safety, and this is a very legitimate concern and is therefore addressed in our bill. Technological advances make it possible to disguise the face and the voice of witnesses upon request, thus not compromising anybody's safety.

We have heard that allowing cameras in the courtroom is an attempt by Congress to micromanage the courts. Of course, this couldn't be further from the truth. Our legislation gives the sole discretion of allowing cameras to the presiding judge. Now, it is very curious to me that the Judicial Conference argues for more judicial discretion all the time, but doesn't trust its judges to make decisions regarding cameras in the courtroom.

We also hear that the Federal appellate courts have the authority to allow cameras in the courts, so what is the need for any change in law? The problem is that the whole court has to agree to it instead of just the presiding judge. Consequently, only the Second and Ninth Circuits currently allow cameras.

All we are doing with this legislation is allowing a presiding judge to make decisions on how to run his or her courtroom, and helping the American people fulfill their right to participate more fully in the judicial process by such judicial discretion. I look forward to the testimony of today's witnesses.

I will turn now to Senator Feingold.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I want to thank you for calling this hearing and for allowing me a few minutes to speak at the outset. I won't be able to stay for very much of the testimony, but I do want to thank the witnesses for coming and assure them that I will review the record of this hearing.

Mr. Chairman, I strongly support allowing cameras in Federal courtrooms for a simple reason. Trials and court hearings are public proceedings. They are paid for by the taxpayers. Except in the

most rare and unusual circumstances, the public has a right to see what happens in these proceedings.

We have a long tradition of press access to trials, but in this day and age the public wants and deserves to see for itself. It may no longer be sufficient to be able to read in the morning paper what happened in a trial the day before.

State courts in the vast majority of States now allow trials to be televised. This experience has shown that it is possible to permit the public to see trials on television without compromising the rights of a defendant to a fair trial or the safety or private interests of witnesses or jurors. Concerns about cameras interfering with the fair administration of justice in this country, I believe, are overstated.

Let me also note that I believe that the arguments against allowing cameras in the courtroom are the least persuasive in the case of appellate proceedings, including the Supreme Court. I had the opportunity to watch the oral argument at the Supreme Court last year in an important case concerning campaign finance reform. It was a fascinating experience and one that I wish all Americans could have.

There is no question in my mind that the highly-trained and prestigious judges and lawyers who sit on and argue before our Nation's Federal appellate courts would continue to conduct themselves with dignity and professionalism if cameras were recording their work. These proceedings are where law is made in this country. The public will benefit greatly from being able to watch Federal judges and advocates in action at oral argument.

So, Mr. Chairman, I am proud to be an original cosponsor of the bill you have introduced with my friend from New York, Senator Schumer. S. 721, it seems to me, is a responsible and measured bill. It gives discretion to individual Federal judges to allow cameras in the courtroom. At the same time, it assures that witnesses will be able to request that their identities not be revealed in televised proceedings. This bill gives deference to the experience and judgment of Federal judges who remain in charge of their own courtrooms. That is the right approach, and I commend you, Mr. Chairman and Senator Schumer, for taking it.

Now, my State of Wisconsin, of course, has a long and proud tradition of open government, and I can tell you it has served us well. Coming from that tradition, my approach is to look with skepticism on any remnant of secrecy that lingers in our governmental processes at the Federal level. When the workings of Government are transparent, the people understand it better and can more thoroughly and constructively participate in it. And they can more easily hold their elected leaders and other public officials accountable. I believe this principle can and should be applied to the judicial, as well as the legislative and executive branches of Government, while still respecting the unique role of the unelected Federal judiciary.

I hope that this hearing today will fully air the arguments for and against S. 721 and that we can prevail upon the chairman of the committee to report the bill and try to get it passed this year. Cameras in the courtroom is an idea whose time came some time ago. It is high time we brought it to the Federal courts.

I thank you, Mr. Chairman.

Senator GRASSLEY. Thank you, Senator Feingold.

Before I introduce the first panel, I have a statement by the distinguished chairman of the full Judiciary Committee, Senator Hatch, to put in the record on the legislation. Also, it acknowledges the fact that we do have a constituent of his, Professor Lynn Wardle, here as a witness as well.

We also have a statement by the ranking minority member of the Senate Judiciary Committee, Senator Patrick Leahy, on the bill as well, and we will put both Senator Hatch and Senator Leahy's statements in the record.

[The prepared statements of Senators Hatch and Leahy follow:]

PREPARED STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Mr. Chairman, I commend my colleague and friend Senator Charles E. Grassley for holding this hearing today. I join him in thanking the witnesses who will appear today to give testimony on S. 271, legislation that would permit cameras and electronic media into our federal courtrooms. I also wish to acknowledge the presence of a fellow Utahn and a fellow graduate of Brigham Young University, Professor Lynn D. Wardle, who is one of the witnesses who will testify today.

The paramount objective of our federal courts is to administer fair and impartial justice to individual litigants in individual cases. In criminal cases, federal courts function properly when those guilty of violating the law are convicted and punished and, conversely, when the innocent are declared innocent and set free. Similarly, in civil cases, federal courts function properly when disputes between litigants are resolved in a just manner. No other mission of the federal courts is as important as its mission to mete out justice.

The Judicial Conference of the United States, the policymaking arm of the federal judiciary, strongly opposes S. 271 because it believes that allowing cameras and electronic media in federal courtrooms could interfere with the ability of federal courts to mete out justice. Supporters of S. 271, in contrast, argue that allowing cameras and electronic media in the courtroom would increase civic education by permitting citizens to witness the federal courts in action. The Judicial Conference, however, maintains that increased public education cannot be allowed to jeopardize the judiciary's primary mission of administering fair and impartial justice.

The Judicial Conference is well-equipped to make this determination. The federal judiciary has examined the issue of whether cameras should be permitted in the federal courts for over 60 years, both in specific cases and through Judicial Conference consideration. The Conference consistently has expressed its view that permitting cameras in the courtroom is contrary to the interests of justice.

According to the Judicial Conference, cameras and electronic media in the courtroom can have an intimidating effect on litigants, witnesses and jurors that negatively impacts the trial process. For example, cameras can intimidate civil defendants who, regardless of the merits of their case, might prefer to settle rather than risk damaging accusations in a televised trial. Moreover, a witness recounting facts to a jury often will act differently when he or she knows that thousands of people are watching and listening to the story. This change in witness's demeanor could have a profound impact on a jury's ability to accurately assess the truthfulness of that witness.

The Judicial Conference also believes that S. 271 does not adequately address the privacy concerns of litigants, witnesses, attorneys, judges and others sucked into the maelstrom of a federal trial. Witnesses and counsel often discuss sensitive information during the course of a trial—information that frequently relates to individuals who are not even parties to the case. Although such personal information about non-parties is available to anyone attending court proceedings in person, televising and broadcasting such information nevertheless would be problematic.

I agree that permitting cameras and electronic media in the courtroom could interfere with the federal courts' primary mission of dispensing justice. Cameras and electronic media can change the way witnesses, litigants, attorneys and even judges act in the context of a trial.

Furthermore, I am concerned about the widespread distribution about sensitive personal information about non-parties that could result if S. 271 is enacted. I also believe that the legislation raises a host of other issues—from security (the tele-

vising of trials would raise the public profile of judges, U.S. Marshals and court personnel) to funding (S. 271 does not authorize funding needed to deal with the costs of allowing cameras and electronic media in the courtroom).

Importantly, I believe that the federal judiciary has special expertise in this area and is entitled to a measure of deference.

Although I have these reservations about S. 271, I am pleased that we will have this opportunity to consider both sides of this question and hear from experts on court procedures.

PREPARED STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Our democracy works best when our citizens are fully informed. That is why I have supported efforts during my time in the Senate to promote the goal of opening the proceedings of all three branches of our government. We continue to make progress in this area. Except for rare closed sessions, the proceedings of the Congress and its Committees are open to the public, and carried live on cable networks. In addition, more Members and Committees are using the Internet and Web sites to make their work available to broader audiences. There remains room for improvement, which is the reason I joined Senator McCain in introducing S. 393, the Congressional Openness Act, which would provide public Internet access to certain Congressional documents, including certain Congressional Research Service publications, Senate lobbying and gift report filings, and Senate and Joint Committee documents.

The work of Executive Branch agencies is also open for public scrutiny through the Freedom of Information Act (FOIA) and the Electronic FOIA amendments of 1996 that I was proud to sponsor. The FOIA has served the country well in maintaining the right of Americans to know what their government is doing—or in some cases, not doing. As President Johnson said in 1966, when he signed the Freedom of Information Act into law: "This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits."

Information about what occurs in our nation's federal courts is available through physical attendance at proceedings which are generally open to the public and restricted only by space limitations, or through review of published decisions. The lines that frequently form outside the U.S. Supreme Court are a testament to the fact that courtrooms are often not large enough to accommodate the public's interest in first hand observations of the proceedings. Press coverage of trials and other court proceedings provides filtered information through the lens of the particular reporter. Yet, cameras and electronic media remain forbidden from federal court proceedings. This blanket prohibition is a barrier to broader public access to view firsthand the proceedings of the federal courts and our highest court, the U.S. Supreme Court. The work of the Judicial Branch could benefit from additional sunshine on its operations. The recent adverse publicity over release of federal judges' financial disclosure reports highlighted the skepticism that greets efforts to put up barriers to public access.

I have co-sponsored S. 721, the Sunshine in the Courtroom Act, along with Senators Grassley and Schumer to bring more sunshine into our federal courts by allowing the televising of federal court proceedings at the discretion of the presiding judge.

This bill would permit presiding appellate and district court judges to allow cameras in the courtroom but does not require them to do so. At the same time, it protects non-party witnesses by giving them the right to have their voices and images obscured during their testimony. Finally, the bill authorizes the Judicial Conference of the United States to promulgate advisory guidelines for use by presiding judges in determining the management and administration of photographing, recording, broadcasting or televising of the proceedings. The authority for cameras in federal district courts would sunset in three years.

Forty-eight states, including my state of Vermont, permit cameras in the courts. This legislation continues this tradition of openness at the federal level. Lessons can be learned from the states as we saw in a recent ruling in New York that struck down that state's ban on televised coverage of trials. That ruling, which occurred in connection with the highly publicized trial of police officers for the murder of Amadou Diallo, was a response to Court TV's motion requesting that cameras be admitted in the trial. New York Supreme Court Justice Joseph Teresi declared unconstitutional a New York statute that had barred cameras from courtrooms for 48 years, stating:

> The quest for justice in any case must be accomplished under the eyes of the public. The denial of access to the vast majority will accomplish nothing but more divisiveness, while the broadcast of the trial will further the interests of justice, enhance public understanding of the judicial system, and maintain a high level of public confidence in the judiciary. [*People v. Barr,* 701 N.Y.S. 2d 891 (Albany Cty 2000)]

In 1994, the Judicial Conference concluded that the time was not ripe to permit cameras in the federal courts, and rejected a recommendation of the Court Administration and Case Management Committee to authorize the photographing, recording, and broadcasting of civil proceedings in federal trial and appellate courts. A majority of the Conference was concerned about the intimidating effect of cameras on some witnesses and jurors.

The New York Times opined at that time that "the court system needs to reconsider its total ban on cameras, and Congress should consider making its own rules for cameras in the Federal courts."

I appreciate the concerns of the Conference, but believe this legislation grants the presiding judge the authority to evaluate the effect of a camera on particular proceedings and witnesses, and decide accordingly on whether to permit the camera into the courtroom. A blanket prohibition on cameras is an unnecessary limitation on the discretion of the presiding judge.

In this time of unprecedented technology, we cannot ignore the fact that television is a significant source of information about the American legal system. Allowing wider public access through televised court proceedings will allow Americans to evaluate for themselves the quality of justice in this country, and deepen their understanding of our justice system. This legislation is a step in the right direction to make our courtrooms and the justice system accessible for public scrutiny. The time is long overdue for federal courts to permit cameras in their proceedings.

I would like to thank Senators Grassley and Schumer for holding this hearing and for their leadership on this important issue.

Senator GRASSLEY. I welcome our first panel. We have two Federal court judges and one State court judge. Our first witness is the Honorable Edward Becker. With nearly 30 years of service on the Federal bench, Judge Becker is currently the Chief Judge of the U.S. Circuit Court of Appeals for the Third Circuit, Philadelphia. Prior to this, he was Judge of the U.S. District Court, Eastern District of Pennsylvania, for 11 years. Judge Becker is also a member of the Executive Committee of the Judicial Conference and will be representing them here today.

Next, we have the Honorable Nancy Gertner. Judge Gertner is a District Judge of the U.S. District Court of the District of Massachusetts, in Boston. This district had a pilot program involving cameras in the courtroom from 1991 to 1994.

Our final judicial witness is the Honorable Hiller Zobel. Judge Zobel is an Associate Justice for the Superior Court Department of the Massachusetts Trial Court in Boston. He has extensive experience with the issue of cameras in the courtroom, having served as Co-Chair of the Massachusetts Bar Association Bench-Bar News Committee, and is currently the Chair of the Superior Court's Media Committee. Judge Zobel was appointed by the American Bar Association to the National Committee on Bar and Members of the Media, which addresses media-court problems. And he serves on the Advisory Board of the Donald W. Reynolds National Center for Courts and the Media at the National Judicial College, University of Nevada.

We will do it as we introduced you, so Judge Becker, Judge Gertner, Judge Zobel, in that order.

PANEL CONSISTING OF HON. EDWARD R. BECKER, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PA, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES; HON. NANCY GERTNER, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, BOSTON, MA; AND HON. HILLER B. ZOBEL, ASSOCIATE JUSTICE, SUPERIOR COURT DEPARTMENT, MASSACHUSETTS TRIAL COURT, BOSTON, MA

STATEMENT OF HON. EDWARD R. BECKER

Judge BECKER. Thank you, Senator Grassley. On behalf of the Judicial Conference, I thank you for the opportunity to present our views on S. 721. My oral statement is somewhat longer than 5 minutes, but in light of the importance of the issues to the Federal judiciary, I respectfully request your indulgence to complete my remarks which will not exceed 10 minutes.

Senator GRASSLEY. Granted.

Judge BECKER. Thank you, sir.

Although the Conference strongly opposes the bill, before I explain why it is important to state that the Conference shares the sponsors' desire for improving public education about the Federal judiciary. But Federal courts are already fully open, and the wisdom of S. 721 therefore turns on whether it will advance public knowledge without damage to court processes. The Judicial Conference believes that the answer is no.

I will begin with what we perceive to be harm to the judicial process, but must first state two baseline premises. First, if this proposal can result in real and irreparable harm to a citizen's right to a fair and impartial trial, it is unacceptable to say that the harm is not great or that it is outweighed by the public good of televised court proceedings. We cannot tolerate in the Federal courts even a little bit of unfairness because that would be inconsistent with our sacred trust.

If one thing is clear to me after 30 years on the Federal bench, it is that balancing the positive effects of media coverage against the degree of damage that camera coverage would bring is not proper. Our mission is to administer the highest possible quality of justice to each and every litigant, not to provide entertaining backdrop for news reporters.

A second baseline point is that there can be a level of unfairness in a trial that does not amount to a constitutional deprivation. I speak here not as a decisionmaker in an individual case, but on behalf of a policymaking body which wants to ensure that no level of unfairness creeps into Federal courtrooms.

I will begin with the question of perceived harms. The Judicial Conference maintains that camera coverage would have a notably adverse effect on court proceedings. First, we believe that a witness telling facts to a jury will often act differently when he or she knows, or even believes that thousands of people are watching and listening to the story. This change in the witness' demeanor could have a profound effect on the jury's ability to accurately assess the veracity of that witness. Media coverage could exacerbate any number of human emotions in a witness, including bravado and overdramatization.

What, you may ask, is the basis for my conclusion? It is the 1994 evaluation by the Federal Judicial Center of the 3-year pilot program of electronic media coverage of Federal civil proceedings in six district courts and two courts of appeals. Anyone who has cited that study in support of the bill has overlooked its most salient findings.

For example, 64 percent of the participating trial judges and 40 percent of the participating attorneys reported that at least to some extent cameras make witnesses more nervous than they otherwise would be. In addition, 46 percent of the trial judges believed that at least to some extent cameras make witnesses less willing to appear in court. And 41 percent of the trial judges and 32 percent of the attorneys found that at least to some extent cameras distract witnesses. Just imagine what the findings would be if criminal cases or truly high-profile cases had been piloted. These are disquieting figures indeed.

But other findings of the FJC study bear on the ability of the courts to administer a fair trial in a televised case. Sixty-four percent of the trial judges found that at least to some extent the cameras caused attorneys to be more theatrical in their presentations. Forty-three percent of the appellate judges found the same syndrome at work.

Seventeen percent of the trial judges responded that at least to some extent cameras prompt people who see the coverage to try to influence their juror friends. These statistics are based on exit interviews with jurors. Seventeen percent of the trial judges and 21 percent of the attorneys found that at least to some extent cameras disrupt courtroom proceedings. The report by appellate judges was even higher—26 percent. Twenty-seven percent of the attorneys reported that the cameras distracted them, and 19 percent of the attorneys believed that at least to some extent the cameras distracted jurors.

There are also disturbing reports about the effect of the cameras on judges. Nine percent of the trial judges reported that at least to some extent the cameras caused judges to avoid unpopular decisions or positions. Fifty-six percent if the appellate judges found that, to some extent or greater, cameras cause attorneys to change the emphasis or content of their oral arguments. And 34 percent reported that at least to some extent cameras cause judges to change the emphasis or content of their questions at oral argument.

One more finding bears particular mention. Fifty-six percent of the trial judges reported their belief that media coverage violates witness privacy. Now, we appreciate S. 721's sensitivity to this issue, but we are concerned about the provision that would require courts to disguise the face and voice of a witness upon his or her request.

Anyone who has been in court knows how defensive witnesses can be. Frequently, they have a right to be. They are summoned into court to be examined in public. Sometimes, they are embarrassed or even humiliated. Providing them with the choice whether to testify in the open or blur their image and voice would be cold comfort indeed.

Sections 1(a) and (b) of the bill would allow the presiding judge of an appellate or district court to decide whether to allow cameras in a particular proceeding. If this legislation were to be enacted, I am sure that all Federal judges would use extreme care and judgment in making this determination.

Nonetheless, Federal judges are not clairvoyants. You never know what is going to happen in a trial. I sat on the trial bench for 11 years and I know that. Even the most straightforward or run-of-the-mill cases have unforeseen developments. Obviously, a judge never knows how a lawyer will proceed or how a witness or party will testify. The notion of conferring discretion upon the trial judge to decide on cameras in advance does not eliminate our concerns.

Now, there are a number of other harms that are detailed in my statement that I do not have the time to discuss here, but I mention them briefly and refer the committee to my prepared statement for supporting arguments in detail.

First, cameras can create security concerns. I note in this regard that there is a greater risk in Federal courts in this respect than in State courts. The number of threats against Federal judges and Federal facilities has escalated tremendously in recent years, and widespread media exposure could exacerbate this problem.

Second, S. 721 seems to assume that camera coverage will be without cost to the Federal judiciary. But that, I respectfully submit, is not so. To the contrary, considerable costs will likely be required not only for equipment and retrofitting facilities, but also in hiring and training of media coordinators in each of the Federal courts. The media representatives surveyed by the FJC represented that a media coordinator was essential to the program.

Now, finally, let me turn to the other part of the putative equation, the supposed educational benefit of cameras in the courtroom. The proponents of cameras rely, of course, on the supposed benefits of public education and understanding court processes, but it has yet to be proven that cameras in the courtroom will significantly further them.

The FJC study sought to analyze the results achieved during the pilot project. The main approach to the issue lay in a content analysis of evening news broadcasts using footage obtained during the pilot program. The 90 stories analyzed presented an average of 56 seconds of courtroom footage per story. There is, I respectfully submit, precious little educational content in 56 seconds.

Moreover, 63 percent even of that courtroom footage was voiced over by a reporter's narration. Thus, the witnesses, parties and attorneys spoke on camera for just over one-third of the air time. The information about the nature of the case was provided by the reporters or anchors.

The FJC report concluded on this point that the vast majority of the stories did not even identify the proceeding as a civil matter. Seventy-seven percent of the stories failed even to identify the type of proceeding involved. The point is that the stories did not provide a high level of detail about the legal process in the cases covered. The analysis revealed that increasing the proportion of courtroom footage used in a story did not significantly increase the information given about the legal process.

In view of the foregoing, I suggest that the benefits of televised coverage of courtroom proceedings are greatly overrated and are certainly far outweighed by the detriments I have described. Television news coverage appears ofttimes simply to use the courtroom for a backdrop or a visual image for the news story which, like most stories on television, are delivered in short sound bites.

Two final points very briefly. The other vehicle for transmission of courtroom proceedings are the cable networks, but they do not alter the balance. First, they are not free. Moreover, cable networks rarely provide gavel-to-gavel coverage. What they do is to package limited trial excerpts with commentary, often interspersed with frequent commercial breaks. What results is not education into court processes, but entertainment.

In conclusion, I note, Mr. Chairman, that the Federal judiciary acknowledges that more needs to be done to improve the general understanding by the public of the Federal judiciary and its processes. But we believe that this goal can best be achieved by active, judicially-sponsored community outreach programs.

Federal courts have in the past few years begun to play an active role in this area through a variety of judicial outreach programs. We believe that this will provide true education about the courts and that any funds available are better spent on community outreach programs than a cameras in the courtroom project.

Mr. Chairman, I thank you for allowing me to testify and, of course, at the appropriate point will be pleased to answer any questions that you may have.

[The prepared statement of Judge Becker follows:]

PREPARED STATEMENT OF HON. EDWARD R. BECKER

The Judicial Conference of the United States, which is the policy-making body for the federal courts, strongly opposes enactment of S. 721, a bill that would "allow media coverage of court proceedings" in the federal courts. The Conference has thoroughly studied this issue and has taken the position that permitting cameras in the federal trial courts is not in the best interests of justice because it may threaten a citizen's right to a fair trial.

Among those reasons supporting the Conference's position are the following.

- The intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process.
- Allowing camera coverage of court trials could interfere with a citizen's right to a fair trial, even though judges would be provided discretion in permitting cameras.
- Permitting camera coverage would almost certainly become a potent negotiating tactic in pretrial settlement negotiations.
- Allowing cameras in federal courts can create security concerns and heighten the level and potential of threats to judges.
- Cameras can create privacy concerns for countless numbers of persons, many of whom are not even parties to the case, but about whom very personal information may be revealed.
- The negative responses in a 1994 Federal Judicial Center report reviewing a pilot program on cameras in the federal courts led the Conference to conclude that the intimidating effect of cameras on witnesses and jurors at trial was cause for alarm.
- Permitting cameras in the courtroom will not significantly further public education and understanding of court processes.

Open proceedings have been a hallmark of the federal judiciary, and the federal courts are leaders in the use of technology to promote access to and use of the federal courts. In addition, the judiciary has developed community outreach programs throughout the country to promote education about the judicial process. But a judge's paramount responsibility is to ensure that all citizens enjoy a fair and impartial trial. It is the mission of the federal judiciary to administer the highest pos-

sible quality of justice to each and every litigant, and not even some unfairness resulting from media coverage can be tolerated. Because cameras in court proceedings could compromise a citizen's right to a fair trial, the Judicial Conference opposes S. 721.

I. INTRODUCTION

Mr. Chairman, and Members of the Subcommittee, my name is Edward R. Becker. I am presently Chief Judge of the United States Court of Appeals for the Third Circuit, having served on the court for over 18 years. Prior to that I was a judge of the United States District Court for the Eastern District of Pennsylvania for over 11 years. I will observe my 30th anniversary on the federal bench on December 11, 2000. I am appearing before you today in my capacity as a member of the Executive Committee of the Judicial Conference of the United States. On behalf of the Judicial Conference, I appreciate the invitation to testify. We hope that the testimony provided here is useful to you.

As you requested, this statement will comment on S. 721, a bill that would "allow media coverage of court proceedings." The Judicial Conference strongly opposes this measure.

The federal judiciary has examined the issue of whether cameras should be permitted in the federal courts for more than six decades, both through case law and Judicial Conference consideration. The Judicial Conference in its role as the policy-making body for the federal judiciary has consistently expressed the view that camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial. We believe that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process. Moreover, in civil cases cameras can intimidate civil defendants who, regardless of the merits of their case, might prefer to settle rather than risk damaging accusations in a televised trial. Cameras can also create security concerns in the federal courts. Finally, cameras can create privacy concerns for countless numbers of persons, many of whom are not even parties to the case, but about whom very personal information may be revealed at trial.

These concerns are far from hypothetical. Since the infancy of motion pictures, cameras have had the potential to create a spectacle around court proceedings. Obvious examples include the media frenzies that surrounded the 1935 Lindbergh baby kidnapping trial, the murder trial in 1954 of Dr. Sam Sheppard, and the more recent Menendez brothers and O.J. Simpson trials. We have avoided such incidence in the federal courts due to the present bar of cameras in the trial courts, which S. 721 now proposes to overturn.

The federal courts have shown strong leadership in the continuing effort to modernize the litigation process. This has been particularly true of the federal judiciary's willingness to embrace new technologies, such as electronic case filing and access, videoconferencing, and electronic evidence presentation systems. The federal courts have also established community outreach programs in which several thousand students and teachers nationwide have come to federal courthouses to learn about court proceedings. Our opposition to this legislation, therefore, is not, as some may suggest, borne of a desire to stem technology or access to the courts. We oppose the broadcasting of federal court proceedings because it is contrary to the interests of justice, which it is our most solemn duty to uphold.

Today I will discuss some of the Judicial Conference's specific concerns with this legislation, as well as with the issues of cameras in the courtroom, generally. However, before addressing those concerns, I would like to provide you with a brief review of the Conference's experience with cameras, which will demonstrate the time and effort it has devoted to understnading this issue over the years. I must emphasize at the threshold that today, as in the past, the federal courts are at all times open to the public.

II. BACKGROUND ON CAMERAS IN THE FEDERAL COURTS

Whether to allow cameras in the courtroom is far from a novel question for the federal judiciary. Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. That rule states that "[t]he taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

In 1972, the Judicial Conference adopted a prohibition against "broadcasting, televising, recording or taking photographs in the courtroom and areas immediately ad-

jacent thereto. . . .” The prohibition applied to criminal and civil cases. The Conference has, however, repeatedly studied and considered the issue since then.

In 1988, Chief Justice William Rehnquist appointed an Ad Hoc Committee on Cameras in the Courtroom, which recommended that a three-year experiment be established permitting camera coverage of certain proceedings in selected federal courts. In 1990, the Judicial Conference adopted this recommendation, and authorized a three-year pilot program allowing electronic media coverage of civil proceedings in six district and two appellate courts, which commenced July 1, 1991. The courts that volunteered to participate in the pilot project were the U.S. Courts of Appeals for the Second and Ninth Circuits, and the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and Western District of New York.

The Federal Judicial Center (FJC) conducted a study of the pilot project and submitted its results to a committee of the Judicial Conference in September 1994.[1] The research project staff made a recommendation that the Conference “authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms. . . .” It is important to note that the recommendations included in the report were reviewed within the FJC but not by its Board.

The Conference disagreed with the conclusions drawn by the FJC staff and concluded that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern. The paramount responsibility of a United States judge is to uphold the Constitution, which guarantees citizens the right to a fair and impartial trial. Taking into account this considerable responsibility placed upon judges, the Conference concluded that it was not in the interest of justice to permit cameras in federal courtrooms.

Two years later, at its March 1996 session, the Judicial Conference again considered the issue. At that session, the Conference voted to strongly urge each circuit judicial council to adopt, pursuant to its rulemaking authority articulated in 28 U.S.C. § 332(d)(1), an order reflecting the Conference’s September 1994 decision not to permit the taking of photographs or radio and television coverage of proceedings in U.S. district courts. The Conference also voted to strongly urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

The Conference, however, made a distinction between camera coverage for appellate and district court proceedings. Because an appellate proceeding does not involve witnesses and juries, the concerns of the Conference regarding the impact of camera coverage on the litigation process were reduced. Therefore, the Conference adopted a resolution stating that “[e]ach court of appeals may decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt.”

The current policy, as published in the Guide to Judiciary Policies and Procedures states:

> A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investigative, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such proceedings, only: (a) for the presentation of evidence; (b) for the perpetuation of the record of the proceedings; (c) for security purposes; (d) for other purposes of judicial administration; or (e) in accordance with pilot programs approved by the Judicial Conference of the United States.

Presently, only two of the 13 appellate courts, the Second and Ninth Circuits, have decided to permit camera coverage in appellate proceedings. This decision was made by the judges of each court. As for cameras in district courts, most circuit councils have either adopted resolutions prohibiting cameras in the district courts or acknowledged that the district courts in that circuit already have such prohibition.

Finally, it may be helpful to describe the state rules regarding cameras in the courtroom. While it is true that most states permit some use of cameras in their

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[1] In 1994, the Federal Judicial Center published a report entitled Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals. The period used by the Federal Judicial Center for its study was July 1, 1991, to June 30, 1993.

courts, such access by the media is not unlimited. The majority of states have imposed restrictions on the use of cameras in the court or have banned cameras altogether in certain proceedings. Although it is somewhat difficult to obtain current information, it appears that approximately 20 states that permit cameras have restrictions of some kind written into their authorizing statutes, such as prohibiting coverage of certain proceedings or witnesses, and/or requiring the consent of the parties, victims of sex offenses, and witnesses. Eleven states do not allow coverage of criminal trials. In eight states cameras are allowed only in appellate courts. Mississippi, South Dakota, and the District of Columbia prohibit cameras altogether. Utah allows only still photography at civil trials, and Nebraska allows only audio coverage in civil trials. In fact, only 16 states provide the presiding judge with the type of broad discretion over the use of cameras contained in this legislation. It is clear from the widely varying approaches to the use of cameras that the state courts are far from being of one mind in the approach to, or on the propriety and extent of, the use of cameras in the courtroom.

III. JUDICIAL CONFERENCE CONCERNS REGARDING S. 721

I would now like to discuss some of the specific concerns the Judicial Conference has with S. 721, as well as the more general issue of media coverage in the courtroom.

A. Cameras Negatively Impact the Trial Process

Supporters of cameras in the courtroom assert that modern technology has made cameras and microphones much less obvious, intrusive or disruptive, and that therefore the judiciary need not be concerned about their presence during proceedings. That is not the issue. While covert coverage may reduce the bright lights and tangle of wires that were made famous in the Simpson trial, it does nothing to reduce the significant and measurable negative impact that camera coverage can have on the trial participants themselves.

Proponents of cameras in the courtroom argue that media coverage would benefit society because it would enable people to become more educated about the legal system and particular trials. But even if this is true, and we take up this question later in the testimony, increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases. While judges are accustomed to balancing conflicting interests, balancing the positive effects of media coverage against an external factor such as the degree of impairment of the judicial process that camera coverage would bring is not the kind of thing judges should balance. Rather, our mission is to administer the highest possible quality of justice to each and every litigant. We cannot tolerate even a little bit of unfairness (based on media coverage), notwithstanding that society as a whole might in some way benefit, for that would be inconsistent with our mission.

The Conference maintains that camera coverage would indeed have a notably adverse impact on court proceedings. This includes the impact the camera and its attendant audience would have on the attorneys, jurors, witnesses, and judges. We believe, for example, that a witness telling facts to a jury will often act differently when he or she knows that thousands of people are watching and listening to the story. This change in a witness' demeanor could have a profound impact on a jury's ability to accurately assess the veracity of that witness. Media coverage could exacerbate any number of human emotions in a witness from bravado and over dramatization, to self-consciousness and under reaction. In fact, even according to the FJC study (which is discussed in more detail later in this statement), 64 percent of the participating judges reported that, at least to some extent, cameras make witnesses more nervous. In addition, 46 percent of the judges believed that, at least to some extent, cameras make witnesses less willing to appear in court, and 41 percent found that, at least to some extent, cameras distract witnesses.

Such effects could severely compromise the ability of jurors to assess the veracity of a witness and, in turn, could prevent the court from being able to ensure that the trial is fair and impartial. Likewise, television cameras could have a profound impact on the deliberations of a jury. The psychological pressures that jurors are already under would be unnecessarily increased by the broader exposure resulting from the broadcasting of a trial and could conceivably affect a juror's judgment to the detriment of one of the parties.

B. S. 721 Inadequately Protects the Right to a Fair Trial

The primary goals of this legislation is to allow radio and television coverage of federal court cases. While there are several provisions aimed at limiting coverage (i.e., allowing judges the discretion to allow or decline media coverage; authorizing

the Judicial Conference to develop advisory guidelines regarding media coverage; and requiring courts to disguise the face and voice of a witness upon his or her request), the Conference is convinced that camera coverage could, in certain cases, so indelibly affect dynamics of the trial process that it would impair citizens' ability to receive a fair trial.[2]

For example, Section 1(a) and (b) of the bill would allow the presiding judge of an appellate or district court to decide whether to allow cameras in a particular proceeding before that court. If this legislation were to be enacted, we are confident that all federal judges would use extreme care and judgment in making this determination. Nonetheless, federal judges are not clairvoyants. Even the most straightforward or "run of the mill" cases have unforeseen developments. Obviously a judge never knows how a lawyer will proceed or how a witness or party will testify. And these events can have a tremendous impact on the trial participants. Currently, courts have recourse to instruct the jury to disregard certain testimony or, in extreme situations, to declare a mistrial if the trial process is irreparably harmed. If camera coverage is allowed, however, there is no opportunity to later rescind remarks heard by the larger television audience. This concern is of such importance to the Conference that it opposes legislation that would give a judge discretion to evaluate in advance whether television cameras should be permitted in particular cases.

We also are concerned about the provision that would require courts to disguise the face and voice of a witness upon his or her request. Anyone who has been in court knows how defensive witnesses can be. Frequently they have a right to be. Witnesses are summoned into court to be examined in public. Sometimes they are embarrassed or even humiliated. Providing them the choice of whether to testify in the open or blur their image and voice would be cold comfort given the fact that their name and their testimony will be broadcast to the community. It would not be in the interest of the administration of justice to unnecessarily increase the already existing pressures on witnesses.

These basic concerns regarding witnesses were eloquently described by Justice Clark in *Estes* v. *Texas*, 381 U.S. 532:

> The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being reviewed by a vast audience is simply incalculable. Some may be demoralized and frightened, come cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward over dramatization. Furthermore, inquisitive strangers and 'cranks' might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot 'prove' the existence of such factors. Yet we all know from experience that they exist. . . .

Estes, 381 U.S. at 547.

It is these concerns that cause the Judicial Conference of the United States to oppose enactment of S. 721.

C. Threat of Camera Coverage Could Be Used as a Trial Tactic

Cameras provide a very strong temptation for both attorneys and witnesses to try their cases in the court of public opinion rather than in a court of law. Allowing camera coverage would almost certainly become a potent negotiating tactic in pretrial settlement negotiations. For example, in a high-stakes case involving millions of dollars, the sample threat that the president of a defendant corporation could be forced to testify and be cross examined, for the edification of the general public, might well be a real disincentive to the corporation's exercising its right to a public trial.

D. Cameras Can Create Security Concerns

Although the bill includes language allowing witnesses who testify to be disguised, the bill does not address security concerns or make similar provision regarding other participants in judicial proceedings. The presence of cameras in the courtroom is likely to heighten the level and the potential of threats to judges. The number of threats against judges has escalated over the years, and widespread media exposure could exacerbate the problem. Additionally, all witnesses, furors, and

[2] We recognize that the legislation would sunset the authority for district court judges to permit cameras three years after the date of enactment of the Act. There is no comparable sunset provision for the appellate courts.

United States Marshals Service personnel may be put at risk because they would no longer have a low public profile.

Also, national and international camera coverage of trials in federal courthouses, would place these buildings, and all in them at greater risk from terrorists, who tend to choose targets for destruction that will give their "messages" the widest exposure. Such threats would require increased personnel and funding to adequately protect participants in court proceedings.

E. Cameras Can Create Serious Privacy Concerns

There is a rising tide of concern among Americans regarding privacy rights and the Internet. Numerous bills have been introduced in both the Congress and state legislatures to protect the rights of individual citizens from the indiscriminate dissemination of personal information that once was, to use a phrase coined by the Supreme court, hidden by "practical obscurity,"[3] but now is available to anyone at any time because of the advances of technology. The judiciary is studying this issue carefully with respect to court records, and Congress has before it a bipartisan proposal to create a Privacy Study Commission to look at a number of issues, including public records.

Broadcasting of trials presents many of the same concerns about privacy as does the indiscriminate dissemination of information on the Internet that was once only available at the courthouse. Witnesses and counsel frequently discuss very sensitive information during the course of a trial. Often this information relates to individuals who are not even parties to the case, but about whom personal information may be revealed. Also, in many criminal and civil trials, which the media would most likely be interested in televising, much of the evidence introduced may be of an extremely private nature, revealing family relationships and personal facts, including medical and financial information. This type of information provided in open court, is already available to the public through the media. Televising these matters sensationalizes these details for no apparent good reason.

Involvement in a federal case can have a deep and long-lasting impact on all of its participants, most of whom have neither asked for nor sought publicity. In this adversarial setting, reputations can be compromised and relationships can be damaged. In fact, according to the FJC study on live courtroom media coverage, 56 percent of the participating judges felt that electronic media coverage violates a witness's privacy. This is not to say that the Conference advocates closed trials; far from it. Nevertheless, there is a common-sense distinction between a public trial in a public courtroom—typically filled with individuals with a real interest in the case—and its elevation to an event that allows and encourages thousands to become involved intimately in a case that essentially concerns a small group of private people or entities.

The issue of privacy rights is one that has not been adequately considered or addressed by those who would advocate the broadcasting of trials. This heightened awareness of and concern for privacy rights is a relatively new and important development that further supports the position of the Judicial Conference to prohibit the use of cameras in the courtroom.

F. S. 721 Does Not Address the Complexities Associated With Camera Coverage

Media coverage of a trial would have a significant impact on that trial process. There are major policy implications as well as many technical rules issues to be considered, none of which are addressed in the proposed legislation. For example, televising a trial makes certain court orders, such as those sequestering witnesses, more difficult to enforce. In a typical criminal trial, most witnesses are sequestered at some point. In addition, many related technical issues would have to be addressed, including advance notice to the media and trial participants, limitations on coverage and camera control, coverage of the jury box, and sound and light criteria.

Finally, S. 721 includes no funding authorization for implementation of its mandates. Regardless of whether funding is authorized, there is no guarantee that needed funds would be appropriated. The cost associated with allowing cameras, however, could be significant. For example, costs would be incurred to retrofit courtrooms to incorporate cameras while minimizing their actual presence to the trial participants. Also, to ensure that a judge's orders regarding coverage of the trial were followed explicitly (*e.g.,* not filming the jury, obscuring the image and voice of certain witnesses, or blocking certain testimony), a court may need to purchase its own equipment, as well as hire technicians to operate it. When considering that these expenses may have to be incurred in each of the 94 districts, the potential

[3] United States Department of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749, (764 (1989).

cost could be significant. An additional considerable cost would be creation of the position of media coordinator or court administrative liaison to administer and oversee an electronic media program on a day-to-day basis. According to the FJC report, the functions of the media liaisons included receiving applications from the media and forwarding them to presiding judges, coordinating logistical arrangements with the media, and maintaining administrative records of media coverage.

G. There Is No Constitutional Right To Have Cameras in the Courtroom

Some have asserted that there is a constitutional "right" to bring cameras into the courtroom and that the First Amendment requires that court proceedings be open to this manner to the news media. The Judicial Conference responds to such assertions by stating that today, as in the past, federal court proceedings *are* open to the public; however, nothing in the First Amendment *requires* televised trials.

The seminal case in this issue is *Estes v. Texas,* 381 U.S. 532 (1965). In *Estes,* the Supreme Court directly faced the question whether a defendant was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. The Court held that such broadcasting in that case violated the defendant's right to due process of law. At the same time, a majority of the Court's members addressed the media's right to telecast as relevant to determining whether due process required excluding cameras from the courtroom. Justice Clark's plurality opinion and Justice Harlan's concurrence indicated that the First Amendment did not extend the right to the news media to televise from the courtroom. Similarly, Chief Justice Warren's concurrence, joined by Justices Douglas and Goldberg, stated:

> [n]or does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. . . . So long as the television industry, like the other communications media, is free to send representatives to trial and to report on those trials to its viewers, there is no abridgement of the freedom of press.

Estes, 381 U.S. at 584–85 (Warren, C.J., concurring).

In the case of *Westmoreland* v. *Columbia Broadcasting System, Inc.,* 752 F.2d 16 (2d Cir. 1984), the Second Circuit was called upon to consider whether a cable news network had a right to televise a federal civil trial and whether the public had a right to view that trial. In that case, both parties had consented to the presence of television cameras in the courtroom under the close supervision of a willing court, but a facially applicable court rule prohibited the presence of such cameras. The Second Circuit denied the attempt to televise that trial, saying that no case has held that the public has a right to televise trials. As stated by the court, "[t]here is a long leap . . . between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history." *Westmoreland,* 752 F.2d at 23.

Similarly, in *United States* v. *Edwards,* 785 F.2d 1293 (5th Cir. 1986), the court discussed whether the First Amendment encompasses a right to cameras in the courtroom, stating: "No case suggests that this right of access includes a right to televise, record, or otherwise broadcast trials. To the contrary, the Supreme Court has indicated that the First Amendment does not guarantee a positive right to televise or broadcast criminal trials." *Edwards,* 785 F.2d at 1295. The court went on to explain that while television coverage may not always be constitutionally prohibited, that is a far cry from suggesting that television coverage is ever constitutionally mandated.

These cases forcefully make the point that, while all trials are public, there is no constitutional right of media to broadcast federal district court or appellate court proceedings.

H. The Teachings of the FJC Study

Proponents of S. 721 have indicated that the legislation is justified in part by the FJC study referred to earlier. The Judicial Conference based, in part, its opposition to cameras in the courtroom on the same study. Given this apparent inconsistency, it may be useful to highlight several important findings and limitations of the study. As I noted earlier in the statement, the recommendations included in the FJC report, which were proposed by the research project staff, were reviewed within the FJC but not by its Board.

First, the study only pertained to civil cases. This legislation, if enacted, would allow camera coverage in both civil and criminal cases. As this Subcommittee is acutely aware, the number of criminal cases in the federal courts continues to rise. One could expect that most of the media requests for coverage would be in sensational criminal cases, where the problems for witnesses, including victims of crimes, and jurors are most acute.

Second, the study's conclusions ignore a large amount of significant negative statistical data. For example, the study reports on attorney ratings of electronic media effects in proceedings in which they were involved. Among these negative statistics were the following:

- 32 percent of the attorneys who responded felt that, at least to some extent, the cameras distract witnesses;
- 40 percent felt that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;
- 19 percent believed that, at least to some extent, the cameras distract jurors;
- 21 percent believed that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 27 percent believed that, at least to some extent, the cameras have the effect of distracting the attorneys; and
- 21 percent believed that, at least to some extent, the cameras disrupt the courtroom proceedings.

When trial judges were asked these same questions, the percentages of negative responses were even higher:

- 46 percent believed that, at least to some extent, the cameras make witnesses less willing to appear in court;
- 41 percent found that, at least to some extent, the cameras distract witnesses;
- 64 percent reported that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;
- 17 percent responded that, at least to some extent, cameras prompt people who see the coverage to try to influence juror-friends;
- 64 percent found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 9 percent reported that, at least to some extent, the cameras cause judges to avoid unpopular decisions or positions; and
- 17 percent found that, at least to some extent, cameras disrupt courtroom proceedings.

These negative statistical responses from judges and attorneys involved in the pilot project dominated the Judicial Conference debate and were highly influential in the Conference's conclusion that the intimidating effect of cameras on witnesses and jurors was cause for alarm. Since a United States judge's paramount responsibility is too seek to ensure that all citizens enjoy a fair and impartial trial, and cameras may compromise that right, allowing cameras would not be in the interest of justice. For these reasons, the Judicial Conference rejected the conclusions made by the FJC study with respect to cameras in district courts.

For the appellate courts, an even larger percentage of judges who participated in the study related negative responses:

- 47 percent of the appellate judges who responded found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 56 percent found that, at least to some extent, the cameras cause attorneys to change the emphasis or content of their oral arguments;
- 34 percent reported that, at least to some extent, cameras cause judges to change the emphasis or content of their questions at oral arguments; and
- 26 percent reported that, at least to some extent, the cameras disrupt courtroom proceedings.

While the Conference did allow each United States court of appeals to determine whether to permit the use of cameras in that circuit, these high negative responses give us a very real indication as to why only two out of 13 courts of appeals have allowed their proceedings to be televised. The two courts that do allow camera coverage are the Second and Ninth Circuits, which voluntarily participated in the pilot project.

Carefully read, the FJC study does not reach the firm conclusions for which it is repeatedly cited. The negative responses described above undermine such a reading. When considering legislation affecting cameras in the courtroom with such permanent and long-range implications for the judicial process, the negative responses should be fully considered. Certainly that is what the Conference focused on. In reality the recommendations of the study reflect a balancing exercise which may seem proper to social scientists but which is unacceptable to judges who cannot compromise the interests of the litigants, jurors, and witnesses, even for some amorphous public good. We turn to that issue now.

IV. THE PUTATIVE EDUCATIONAL BENEFIT OF CAMERAS IN THE COURTROOM

The proponents of cameras in the courtroom rely, of course, on the putative benefits of public education and understanding of court processes. The Judicial Con-

ference supports that goal but does not agree that cameras in courtrooms will significantly further it. The FJC study analyzed the results achieved during the pilot project. The main approach to the issue lay in a content analysis of evening news broadcast using footage obtained during the pilot program.[4] The content analysis is disquieting. The ninety stories analyzed presented a total of one hour and twenty-five minutes of courtroom footage, with an average of fifty-six seconds of courtroom footage per story. There is not too much educational content in 56 seconds. Moreover, most of the courtroom footage was voiced over by a reporter's narration. On average, reporters narrated 63 percent of all courtroom footage. Thus, the witnesses, parties, and attorneys spoke on camera for just over one-third of the total air time. In at least one-half of the cases photographed, information on the nature of the case was provided by reporters or anchors without relying on the participants.

The FJC report also sought to determine specifically the extent to which the stories provided basic educational information about the legal system, examining whether five pieces of information were conveyed to the viewer: (1) identification of the case as a civil matter; (2) identification of the type or proceeding, such as a hearing or trial; (3) statements about whether a jury was present; (4) descriptions of the proceedings on a given day; and (5) discussion of the next step in the legal process. The report concluded as follows:

> The vast majority of stories (95 percent of non-first day stories) did not identify the proceeding covered as a civil matter. In addition, 77 percent of the stories failed to identify the type of proceeding involved. Almost three-quarters (74 percent) of all stories did not provide information about whether a jury was present, including half of the stories that identified the covered proceedings as a trial.
>
> Most stories (74 percent) did explain what transpired in court on a particular day, such as who testified or what evidence was presented. In multiple-day cases, 90 percent of the stories explained the daily proceedings, compared to 63 percent in single-day stories. Seventy-six percent of the daily proceedings in a story were explained by a combination of reporter narration and participant discussion. Only 29 percent of stories mentioned the next step in the litigation process in the case.
>
> Thus, the stories did not provide a high level of detail about the legal process in the cases covered. In addition, the analysis revealed that increasing the proportion of courtroom footage used in a story did not significantly increase the information given about the legal process.

In view of the foregoing, we suggest that the benefits of televised coverage of courtroom proceedings are overrated (and are certainly far outweighed by the detriments described above). Television news coverage oftentimes appears simply to use the courtroom for a backdrop or a visual image for the news story which, like many of such stories on television, are delivered in short sound bites and not in depth.

The FJC study also reported that Court TV covered 28 cases under the program and that C-SPAN covered 7 cases. However, it does not appear from records available to us that these proceedings were broadcast either in their entirety or continuously. The paucity of cases selected by C-SPAN—seven in two years—suggests that the tediousness, technicality, and sheer length of trials are obstacles to comprehensive media transmission, except in the sensational kinds of cases where the harms described previously are the greatest.

V. A BETTER VEHICLE FOR PUBLIC EDUCATION

The federal judiciary acknowledges that more needs to be done to improve the general understanding by the public of the federal judiciary and its processes. We believe that this goal can best be achieved by active federal judicial involvement. Federal courts have, in the past few years, begun to play an active role in this area through community outreach programs. Under the aegis of these programs, thousands of students, teachers, and other members of the public have come into federal courts to learn more about the federal courts and to engage in dialogue with judges, attorneys and court personnel. National initiatives to increase public understanding

[4] This analysis was conducted by the Center for Media and Public Affairs under contract with the FJC. Content analysis is the objective and systematic description of communicative material. The content analysis performed for this study proceeded in two phases. First, a qualitative analysis was used to identify the symbols, stylistic devices, and narrative techniques shaping the form and substance of the news stories; this allowed the researchers to develop analytic categories based on the actual content of the stories rather than imposing priori categories. Second, the analytic categories that were developed and pre-tested formed the basis of a quantitative analysis, which involved the systematic coding of story content into discrete categories.

of the federal court system are underway in pilot programs in two circuits. In addition, over the last two years, the federal judiciary has conducted Law Day programs for high school seniors, during which mock trials were broadcast to 2,000 students at over 30 participating courthouses nationwide.

Additionally, plans are underway for federal courts to assist school personnel in planning curriculums designed to instruct about the federal judiciary, culminating in court visits (or visits by judges to schools). The positive results of these kinds of programs are self-evident. We believe that it would be preferable to expend the monies that would be necessary to support a cameras in the courtroom project on these community outreach programs.

VI. CONCLUSION

When almost anyone in this country thinks of cameras in the courtroom today, they inevitably think of the Simpson case. I sincerely doubt anyone believes that the presence of cameras in that courtroom did not have an impact on the conduct of the attorneys, witnesses, jurors, and judge—almost universally to the detriment of the trial process. Admittedly, few cases are Simpson-like cases, but the inherent effects of the presence of cameras in the courtroom are, in some respects, the same, whether or not it is a high-publicity case. Furthermore, there is a legitimate concern that if the federal courts were to allow camera coverage of cases that are not sensational, it would become increasingly difficult to limit coverage in the high-profile and high-publicity cases where such limitation, almost all would agree, would be warranted.

This is not a debate about whether judges would be discomfited with camera coverage. Nor is it a debate whether the federal courts are afraid of public scrutiny. They are not. Open hearings are a hallmark of the federal judiciary. It is also not about increasing the educational opportunities for the public to learn about the federal courts or the litigation process. The judiciary strongly endorses educational outreach, which could better be achieved through increased and targeted community outreach programs.

Rather, this is a decision about how individual Americans—whether they are plaintiffs, defendants, witnesses, or jurors—are treated by the federal judicial process. It is the fundamental duty of the federal judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. For the reasons discussed in this statement, the Judicial Conference believes that the use of cameras in the courtroom could seriously jeopardize that right. It is this concern that causes the Judicial Conference of the United States to oppose enactment of S. 721. As the Supreme Court stated in *Estes*, "[w]e have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." 381 U.S. at 540.

Mr. Chairman, thank you again for the opportunity to testify and present these views. I will be pleased to answer any questions you or the other members of the Subcommittee may have.

The CHAIRMAN. We will wait until the panel is done and then we will ask questions.

Let me announce now, because I don't know who will be able to come and not come, sometimes whether you have a large turn-out or not much of a turn-out, we have questions in writing, sometimes follow-up and sometimes a sole question. So we would like to have those responses back in two weeks, if we could, after today.

Now, Judge Gertner.

STATEMENT OF HON. NANCY GERTNER

Judge GERTNER. Thank you, Senator Grassley. I am delighted to be here and to speak in favor of the bill. I am in a somewhat unique position because I am a Federal judge, but I am speaking really on my own behalf.

I have to concede that opinions on my own court are divided, but I strongly disagree with the position taken by the Judicial Conference.

I come to this issue in really three capacities. As a former litigator, I litigated Federal and State criminal and civil proceedings

for 22 years. I come as a sometime academic. I teach at Yale Law School now, have taught at Harvard and BC. And I come as a judge. I have been on the bench for 6 years.

As a litigator, I, in fact, was a participant in trials that had had gavel-to-gavel coverage. Some were high-profile cases. The last noteworthy case I tried involved Matthew Stuart, who was the brother of Charles Stuart, who was accused of killing his pregnant wife. But, in addition, I participated as a litigator in lesser-known cases that Court TV covered gavel to gavel.

I want to address two broad areas. I want to address why I speak in favor of the bill first, and then I want to address the concerns which I think are real but which I think can be dealt with and which I think we have an obligation to deal with.

Public proceedings in the 21st century means televised proceedings. The meaning of "public" today is television. In a study published over 20 years ago, it was reported that 54 percent of the American public indicated that they got their news only from television. I believe that that figure is probably dramatically higher today. In addition, the public is enormously interested in and concerned about criminal justice issues and how the courts are run.

At the same time, information about the courts—and I quite agree with Judge Becker on this—is notoriously distorted. Quoting from another judge who described what happens when you see a reporter in your courtroom, he says, "Often, I know that the reporter had no idea what I was doing, what the judicial system was about, what the language being used in the court meant, what rights were being protected and advanced through the legal system. Rarely do reporters"—he is talking about print reporters—"have any expertise in the law. The vast majority come from journalism or liberal arts schools, not law schools. Covering cops and courts is usually an entry-level position. Trained court reporters are a dying breed and turnover is high."

Now, I am not suggesting that putting sunshine through television will necessarily obviate this problem. Obviously, television reporters can edit the proceedings, take snippets out of context, sprinkle it with inappropriate commentary. But certainly gavel-to-gavel coverage, in which the people have an opportunity to see the actual words of a participant, is extraordinarily beneficial.

We have anecdotal evidence of that. Again, citing, as you did, to the O.J. Simpson case, it was extraordinary to me as both a litigator and a judge to listen to some of the comments during the O.J. Simpson proceedings. There were people talking about how they believed that O.J. Simpson was probably guilty, but not beyond a reasonable doubt. It was a level of sophistication about that concept that I frankly had not heard in the voir dire that I regularly conduct of jurors.

In other words, having seen this gavel to gavel, they were basically invited into a debate which was a very sophisticated and very important debate. There were lots of problems with the trial, but in terms of public education I thought it was extraordinary.

I want to draw an analogy here. I had occasion recently to visit a courtroom in one of the countries of the former Soviet bloc. The proceedings were open, my host told me, and showed me a courtroom. The courtroom was tiny. There was one bench for the public.

It was formally open, but practically speaking public access was limited. We understand in this country that making something public requires affirmative efforts on our part, in a sense meaningful public access—courtrooms big enough to include people who will be interested in the proceedings, handicapped access, provision for the media.

What we are talking about here today is, in the 21st century, meaningful access to the courts means television. The point is a simple one. When the majority of Americans get their information through a screen, when they are extremely interested in the proceedings in our courtrooms, our obligation to make the proceedings public has to include allowing proceedings to be televised.

Now, I don't deny that there are important concerns that the participants will somehow play to the audience, play to the cameras. I think that it is overstated. To the extent that this happens at all, I believe it is more a function of the fact that many of the televised cases have been high-profile cases in which the participants already know there is a larger audience and already playing to the larger audience. It is also not entirely clear to me that this is in some measure a bad thing. If the judge understands that he or she is under scrutiny and is therefore more careful, it seems to me that that is an advantage.

In many jurisdictions, in addition, cameras in the courtrooms are novelties, and so to some degree playing to the larger audience is a function of the novelty of the technique. It has to be of significance here and Federal courts, it seems to me, have to pay attention to the fact that 47 State jurisdictions have cameras in the courtroom, and that the studies done of those jurisdictions have uniformly produced favorable results.

And if the grandstanding and inflammatory concerns that we have here didn't occur in those State proceedings, they shouldn't occur in the Federal proceedings. The State courts are dealing with rape and murder and child abuse, and they have conducted this experiment over the past several years without problems.

The second concern is the impact of televised trials on the public, that this will somehow undermine the legitimacy of the proceedings. And the data in this regard is mixed. On the one hand, the public learns an enormous amount about trials. On the other hand, there is a concern which actually has not been expressed before here and was shared with me by Nina Totenberg, of NPR.

She says that sometimes the people at home will believe that they have heard all the testimony, that they have seen the proceedings, that they have, in fact, heard all the testimony from top to bottom when, in fact, they haven't. You watch the proceeding on television, you take a bathroom break, you answer the phone, you make popcorn, you miss critical testimony. Yet, then when the outcome is inconsistent with what the home viewer believes, the home viewer may then be cynical.

I think these concerns can be addressed. Attorneys and judges have to work with the media to make it clear to the public that their experience of the trial sitting at home in their living room is not the same as the participants. More real-time court coverage should be encouraged, not just of the high-profile cases but of the

ordinary cases. The more sophisticated the public is, the easier this will be.

In any event, I think that the crisis of legitimacy is greater if we, the Federal courts, are the only courts and one of the few public proceedings not to be televised. The strength of this bill, as others have stated, is that it enables a judge to dovetail the television coverage to the case at hand, to tailor the rules to the case at hand, and it seems to me that that is a good thing.

I don't want to be Judge Judy. I don't want to wear a frilly collar, harangue witnesses, make good television. I want to be the Honorable Judge Gertner, to preside with dignity over a courtroom where my words are understandable, meaningful, and most significantly accessible to the general public.

In fact, I found a wonderful quote by Justice Harlan in 1965 from the Supreme Court which I think sums up my testimony. Justice Harlan, in a case, in fact, reversing conviction because of the circus atmosphere then created by television which was very intrusive in a way that it is not today, said, "The day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process." That day, Senators, is here.

Thank you.

[The prepared statement of Judge Gertner follows:]

PREPARED STATEMENT OF HON. NANCY GERTNER

I want to thank you for giving me this opportunity to speak before you. I am strongly in favor of this bill.

Let me say at the outset, that I speak only for myself, and surely not for the other judges of my Court. Opinion is divided on the issue of cameras in the courtroom in my Court, as it is in other federal courts around the country.

I come to this issue both as a judge and as a former litigator. I was a trial lawyer for twenty-two years, representing clients in both civil and criminal cases, in federal and state courts. Because Massachusetts has had cameras in the courtroom for a considerable period of time, I have had the privilege of participating in a number of televised trials and other proceedings: A high-profile murder case involving a battered woman accused of killing her abusing spouse in Springfield, Massachusetts; a less well-known murder case involving a young man accused of killing a neighbor in Natick, Massachusetts, and my last case, the infamous case of Matthew Stuart, the brother of Charles Stuart, accused of participating in an insurance scam. Charles Stuart, as you may remember, was alleged to have killed his pregnant wife.

I have been a judge for 6 years. During that period of time I have presided over a number of cases which attracted media attention and would have been televised had that option been available.

I would like to address two broad areas today. First, public proceedings in the twenty-first century necessarily mean televised proceedings. Television is the means by which most people get their news. Moreover, at a time when polls suggest that the public is woefully misinformed about the justice system, more information, and relatively unmediated information, is better than less information.

Second, the concerns raised by the opponents of this bill are, to a degree, misplaced. In any event, the disadvantages do not compensate for the advantages. There is concern that the participants in televised trials somehow skew their presentation because of the gaze of the cameras. I believe that if such behavior occurs at all, it is a function of two things: The fact that most of the televised trials are high-profile cases, where the participants are already acutely aware of the publicity surrounding them, and the fact that televised trials, particularly in federal courts, are a relative novelty.

There is also concern that televised proceedings will somehow undermine the legitimacy of our courts with the public. The data on this is mixed. On the one hand, the public learns an enormous amount from actually seeing trial proceedings. Given the strength of our system, seeing it in operation can only bolster the public's con-

fidence. On the other hand, televised proceedings do give the public an opportunity to second guess the jury, believing—mistakenly—that they have seen all of the trial, that they are in the same position as the jurors, when they are not. When the outcome is different than they expected, they become cynical. As I describe below, I believe that these concerns can be addressed by judges, by commentators, by educators, and that, in any event, they do not outweigh the advantages.

On the first point: Public proceedings in the twenty-first century necessarily mean televised proceedings. In a study published over twenty years ago, it was reported that some 54 percent of the American public indicated that they get their news from the television.[1] I can only assume that that number is substantially higher today. Information about the courts—from whatever the source—is notoriously distorted. Former Judge Thomas Hodson, for example, described the situation as follows:

> When I sat on the bench I always wondered about any reporter I saw in my courtroom. Often I knew that the reporter had no idea what I was doing, what the judicial system was about, what the language being used in the courtroom meant, and what rights were being protected and advanced through the legal system. Rarely do reporters have any expertise in the law; the vast majority come from journalism or liberal arts schools, no law schools. Covering "cops and courts" is usually an entry level position at newspapers and is subject to general assignment reporting at television stations. Trained court reporters are a dying breed. Turnover is high.[2]

I am not suggesting that the televising court proceedings necessarily means accurate, unedited, undistorted coverage. Obviously, television reporters can edit the proceedings, take snippets out of context, sprinkle it with inappropriate commentary. But when they offer the so-called "gavel to gavel" coverage, when people have an opportunity to hear the actual words of the participants, I think the result can only be beneficial.

Let me bring up a particularly controversial example, the O.J. Simpson trial. That trial was credited with most of the backlash to cameras in the courtroom, and with good reason. There was much to criticize, much to be concerned about in the way the trial was conducted and covered. But one thing was clear: More people were talking about legal issues in more sophisticated ways than I, for one, had ever heard. There were discussions on television, and in the print media, as well as on the streets as to whether Mr. Simpson was "probably" guilty, but the government had not proved its case "beyond a reasonable doubt." That distinction—the difference between "probably guilty" and "proof beyond a reasonable doubt"—is a sophisticated one. It was all the more telling given the fact that most polls suggest that the majority of Americans harbor substantial misconceptions about the criminal justice system—what "beyond a reasonable doubt" means, who has the burden of proof, etc.

Let me draw an analogy here. I recently had the opportunity to visit courts in a country in the former Soviet Union. Trial proceedings were open, my hosts told me, but the courtrooms were small and had only a single bench for the "public." It was formally open to everyone, but practically speaking, public access was extremely limited.

In this country, we understand that to make something public requires affirmative efforts on our part—courtrooms big enough to include the people who will be interested in the proceedings, handicapped access, provision for the media, etc. Indeed, we are trying to use our technology to enhance that access. The Federal Courts are moving rapidly towards electronic case filing, enabling lawyers and the public to get access to the written files through their computers. And the public's interest in court proceedings is growing, not only for the more bizarre and scandalous cases.

The point is a simple one: When the majority of Americans get their information through a screen, our obligation to make proceedings public has to include allowing those proceedings to be televised.

Now I want to address the very important concerns that have been raised by opponents of this bill. First, there are concerns that the participants will somehow "play to the audience," distorting their presentations because of the insistent cameras. To the extent that this happens at all, I believe it is more a function of the fact that many of the televised cases have been high-profile cases. In such cases, all of the participants are already acutely aware that there is a larger audience. The

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[1] Thomas Hodson, *The Judge: Justice in Prime Time*, 87,92 (Winter 1992).

[2] *Id*. at 87.

question is whether the presence of cameras materially changes that, and in my experience, it does not.

Moreover, in many jurisdictions, cameras in courtrooms are novelties. Whatever impact derived from their presence would surely be lessened as time passes, as everyone becomes more and more used to their presence. This is especially the case as the technology improves, as cameras become less and less physically intrusive in the courtroom.

That has been the experience of the Massachusetts court system and court systems across the country. There are cameras in the courtrooms of forty-seven states. Numerous studies have been conducted by these jurisdictions to test the impact of the cameras on the proceedings. The results have been favorable—that televised coverage does not impeded the fair administration of justice, does not compromise the dignity of the court, and does not impair the orderly conduct of proceedings. Indeed, the opposite is the case—that public education about the system is greatly enhanced.

Second, there are concerns about the impact of televised trials on the public, that televising the proceedings in fact undermines their legitimacy with the public. I would be remiss if I did not admit that this problem gives me pause as well. The public watches a televised trial and believes that it is sitting in the shoes of the juror when it plainly is not. The citizen will answer the phone, take a bathroom break, make popcorn, and miss critical testimony. He or she is watching the proceeding in their home, on their couch, relaxed, and without the obligation to make any decisions about the case. The jurors sit in a formal courtroom, the American flag at the front, and they are sworn to be attentive, to be fair. They are instructed about their awesome responsibilities; ideally, they have no other distractions. When the jury's decision is different from the viewing public's decision, the public may well become cynical about the system.

There is a wonderful moment in the movie, "Twelve Angry Men" that illustrates the point. A juror is recounting the testimony of a witness. The witness reported that he heard the sound of a body hitting the ground on the floor above him. He then ran to the door, opened it, and saw the defendant running down the stairs. The juror remembered that the witness, an elderly man, walked with a limp to the witness stand. The juror concluded that the witness' testimony about "running to the door" was less than credible. The point was that there is a difference between experiencing a trial within the four walls of a courtroom and experiencing it through a television screen.

I think these concerns can be addressed. Attorneys and judges must work with the media to make it clear to the public that their experience of trials is not the same as the participants. More "real time" court coverage should be encouraged, not just of the high-profile cases but of the ordinary cases.

I believe that there will be a greater crisis of legitimacy were this means of access to our courts through television to be denied. More and more of our governmental proceedings are being televised. The judicial system should not be excluded.

Finally, the strength of this bill is that it does not require cameras, insist on them, encourage them. Rather it allows judges to exercise their discretion to permit cameras in appropriate cases, subject to fair limitations.

Senator GRASSLEY. Thank you, Judge Gertner.

Judge Zobel, please proceed.

STATEMENT OF HON. HILLER B. ZOBEL

Judge ZOBEL. Well, here I am a State court judge having to moderate, as it were, between disputing Federal judges. So if Mr. Chairman and Senator Schumer will excuse me, I will not express an opinion on the merits of S. 721. Let me share with you some experience that I have had, namely 20 years of being in a court system and trying cases before television.

My basic premise is that television cameras and still cameras don't interfere with the proceedings any more than the television cameras and the still cameras here interfere with the proceedings. Witnesses, in my experience, tend to focus on being witnesses and they very soon forget about the camera, if they think about it at all. Lawyers, the same thing.

Now, some people say, well, it affects the way lawyers handle the case; lawyers are natural showboats. Well, putting aside the slander on our profession, let me say that in my experience it is the judge who decides who is going to be a showboat. And to the extent that showboating begins, the judge has ample tools and presumably an ample temperament for dealing with the showboats.

To the extent that the television camera makes the judge a showboat, well, my experience has been that that doesn't happen. And if it did happen, it seems to me it is not a bad thing for the public to realize that here is a showboating judge. That comes under the heading of what Judge Gertner referred to as television making a judge better.

To the extent that a judge is conscious of the audience and tries to perform in such a way that the audience will approve of his conduct—I am not talking about his decisions; that is something else—but approve of his conduct, that, I think, is not a bad thing, but a good thing.

It seems to me that when you are talking about television in the courtroom, you have to distinguish between what happens in the courtroom and the use that the video information that is gathered in the courtroom is put to outside of the courtroom. I have serious questions about judges trying to control the use of the information that is developed in the courtroom.

Newspapers cover a trial. Sometimes the reports are accurate, sometimes they are fatuous, sometimes they are inflammatory. Television, even without cameras in the court, covers court proceedings. They have artists who draw wonderful pictures and then the reporter who was sitting in the courtroom talks about it.

Well, the newspaper reporter or the television reporter can be quite, quite inaccurate, inflammatory, fatuous, and any other derogatory adjective you care to apply. But that is not our concern. Our concern is how things go in the courtroom, and my experience has been that whatever use gets made of the material out of the courtroom, a judge can control the court and can ensure that the proceedings go the way they are supposed to go.

I have difficulty, I have to say, in understanding how a television camera makes things unfair because the one argument that I have encountered—and I must say that I haven't encountered it as a practical matter in Massachusetts because even judges who don't much like trials by television agree that television doesn't particularly cause any problems.

But the one potential difficulty is the jury, the idea that jurors will watch the television, or that people who watch the television will talk to the jury. Well, unless you are going to lock up every jury—and nobody is recommending that—the way we deal with the problem of outside juror influence is to tell the jurors very severely, don't watch television, don't read about the case in the newspapers, don't listen on the radio. And nowadays we have to say don't try looking for it on the Internet. And when the jury comes back in the morning, we ask the jury have they obeyed the court instructions.

Now, that seems to me to be about as far as you can go, and it seems to me to be effective. Jurors take very seriously a judge's instructions not to talk about the case, and there is a famous story in Massachusetts about a husband and wife. The wife was a juror,

the husband was not, and the husband said to the wife, what kind of a day did you have in court today? And she said, I am not supposed to talk about it.

We don't have problems in Massachusetts, though the judge has authority to keep the cameras out, but he has to give reasons. The presumption is that cameras will come in. The one significant case where the cameras were kept out—and it was only after an appellate judge approved to keeping them out—was a case in which the defendant had given clear indication that if the cameras were in the courtroom, he would use the presence of the TV as a platform for espousing the views that had led him to commit the homicides for which he was ultimately convicted. There, the court was shut, but it was shut only because of this overpowering reason.

Thank you.

[The prepared statement of Judge Zobel follows:]

PREPARED STATEMENT OF HON. HILLER B. ZOBEL

SUMMARY

Cameras, photographic and video, cause no problems in courtrooms.

Judges can control how anyone, including lawyers, behaves in court.

Use of video images out-of-court raises different issues, but they are unrelated to the question of how (and if) cameras affect trials.

Cameras in court do not affect the conduct of trials or the fairness of the results.

Massachusetts has since 1980 allowed cameras under a tightly-drawn but camera-favoring rule, which mandates allowing coverage, whether or not the parties agree, unless the judge can be persuaded that coverage will create either a substantial likelihood of harm to any person, or some other serious harmful consequence.

Mr. Chairman, and Members of the Sub-Committee: As a member of a state's judiciary, I must necessarily ask you to excuse me from commenting on the merits of proposed federal legislation. I am, however, honored and pleased to respond to your request for my views on the general subject of cameras in the courtroom. In doing so, however, I must emphasize that I speak only as an individual, not on behalf of the Massachusetts court system, the Superior Court, or any other judge.

Courtroom cameras have long been a subject of my professional interest. To ensure now full disclosure of any possible bias, here what trial lawyers call "a little background."

For several years prior to joining the Superior Court in 1979, I was libel counsel to WCVB–TV Channel 5, Boston. In my Pleistocene youth, I worked one summer as what in those gender-insensitive days we called a "copy boy" for the San Francisco Chronicle and was, in both college and law school, sports correspondent for the New York Herald-Tribune.

Since becoming a judge, I have served as co-chair of the Massachusetts Bar Association's Bench-Bar-News Committee and on the "Fire Brigade," a group of judges and newspeople aiming to head off potential court-media conflicts. I was also a member of the court-appointed committee which drafted Massachusetts' rule governing impoundment of court papers, and on a committee which reviewed privacy and access rules concerning information about criminal convictions. I now chair the Superior Court's Media Committee.

For five-and-a-half years during the 1980's, the Christian Science Monitor carried my monthly column, "Judging the law."

In 1998, the American Bar Association appointed me to the National Committee of the Bar and Members of the Media, which meets thrice annually to exchange views and address media-court problems. I serve on the Advisory Board of the Donald W. Reynolds National Center for Courts and Media at the National Judicial College/University of Nevada.

I have spoken about cameras in the courtroom and high-visibility trials at two national symposia sponsored by the College and the Reynolds Center; at one sponsored by the First Amendment Center of Vanderbilt University; at one sponsored by the National Conference of State Trial Judges; at one sponsored by the American Conference of Trial Judges; and at one during the 1998 annual meeting of the Associated Press Managing Editors.

I was one of the advisors to the National Center for State Courts when the NCSC revised its handbook on the management of high-visibility trials.

Finally, I have conducted trials ex camera as it were, with juries and without, in the years since 1980, when Massachusetts began permitting the practice.

Briefly put, I do not believe that the courtroom presence of a camera—video or still—in any way interferes with or, indeed, affects to any degree the decorum of the proceedings or the fairness of the outcome. In my experience, participants ignore the equipment and its operator, concentrating instead on the job at hand.

When cameras first came in, many people feared that lawyers would inevitably play to the video audience. That has not happened in any of my trials; discussion with Massachusetts colleagues (even those who dislike the practice) suggests that my experience is typical. The reason is simple: the lawyers and witnesses know that at the first sign of inappropriate behavior, the judge, possessing ample conventional means of maintaining order, would certainly do so.

We all must, however, emphasize the vital distinction between the presence of the camera in court and the use that society makes of the images the camera produces. Failure to recognize the difference has, I believe, caused much of the judicial antipathy toward the visual media.

Admittedly, an appetite for profit inspires the desire to televise court proceedings. That is hardly a disqualifying defect.

It is also true that televising trials provides an inexhaustible pool of commercial diversion. This fact is irrelevant to the present issue. Historically, Americans have always regarded trials—particularly criminal trials and scandalous domestic litigation—as prime sources of voyeuristic recreation. Television merely expands the audience. Photographic cameras do not change the existing equation; the public now views photos instead of artists' renditions.

Another criticism focuses on the distorted view of the judicial process which televising a trial produces. This is a valid comment, raising a serious issue. The nature of television news broadcasting requires compressing a whole day's courtroom activity into perhaps one minute. Moreover, because television is such a visual, drama-oriented medium, what appears during the newscast may not be the most important even in terms of the trial and its eventual outcome. Nonetheless, the viewer begins to feel like a true spectator and to form judgments which, though resting on partial information at best, encourage an inappropriate certitude. Thus someone who has seen only a fraction of the evidence, nonetheless tends unconsciously to assume judgmental competence equal to the jury's.

Continuous "gavel-to-gavel" coverage does not solve the problem. First of all, very few people actually watch the entire proceedings. Boredom, hunger, the exigencies of daily life, telephone calls, and bodily demands all conspire to interrupt. Second, even to someone viewing everything, the screen only shows what the camera sees; that, as anyone who has spent time in a courtroom knows, omits a great deal, besides implicating the often considerable difference between a witness' on-screen image and appearance in-the-flesh.

Third, a trial analogizes naturally to a sports event, with its shift of advantage and disadvantage, its focus on winning, its ready susceptibility to prediction, analysis, and second-guessing. This surface similarly, combined with television's need never to allow silence or a blank screen, stimulates a kind of play-by-play approach, larded with endless dollops of "color" commentary, the whole display thereby turning courtroom coverage into a parody of sports broadcasting.

This can lead to downright silliness. One one occasion, during a high-visibility trial, the hostess at a party I was attending turned on the television set just in time to hear three distinguished Massachusetts lawyers solemnly forecasting the next day's events. "Here's what Judge Zobel is certainly contemplating," said one. "Judge Zobel surely is considering thus-and-so," said another. "Judge Zobel has got to have this on his mind," said the third. Meanwhile, the real Judge Zobel, I happen to know, was sitting on the sofa, not thinking any of the above.

All this would be harmless enough, except that over time, television tends to impose on the public a skewed view of a complicated subject: the administration of justice. Throw in the idiosyncratic behavior of Judge Judy and her imitators, and you convey to the community the idea that rendering justice is nothing more than an esoteric game umpired by zanies in black robes.

I have discussed this aspect of cameras in the court precisely to show that the camera per se has very little to do with how the public uses the images the camera transmits. More to the point, even though judges may—as I do—deplore and even condemn the foolishness, vapidity, and error that television thrives on, keeping cameras out of courts is not the way to bring the public to a more intelligent appreciation of what the administration of justice means and needs.

Even if by excluding the camera we could ensure enlightenment (which, of course, raises the paradox of seeking to educate by denying information), I have serious doubts whether in our society judges should be easily assume the role of Public Im-

provers. Even assuming their competence to do so, it seems to me that judges have enough else to do.

Judges are public servants, performing public functions under a long-standing tradition of openness and visibility. This necessarily requires us to experience public heat. To say that we will not expose ourselves to wider viewing leads to a kind of elitism that even a non-elected judiciary (which, I am happy to say, includes my state's judges) needs to avoid.

In Massachusetts, the authority for cameras in court is entirely judge-made, a rule promulgated by the Supreme Judicial Court, which, acting as a body, oversees our entire judicial system. The rule, the text of which is appended to this statement, has been in place since 1980. It resulted from the intense work of a consultative committee, chaired by a Superior Court judge, but including other jurists and representatives of the media and the Bar.

The rule does not seek to regulate the use of cameras outside the courthouse, indeed, outside the courtroom. Public streets and public spaces are, in Massachusetts, not subject to judicial control vis a vis photography and televising. To the extent that these impinge on such activities as jury viewing of an out-of-court locus, the court retains common-law authority to prevent interference. That power extends to keeping the camera at an appropriate distance. We have developed an advisory protocol for judges' guidance, a copy of which is appended to this statement.

In the courtroom, Massachusetts judges must allow cameras operated "by the news media for news gathering," absent certain narrowly-defined conditions.

The first is the substantial likelihood of (a) harm to any person; or (b) other serious harmful consequence.

Determination of the risk and assessment of both the likelihood and the harm rests exclusively with the trial judge. Even unanimity among the parties cannot preclude coverage.

"Harm" has been interpreted to mean not the mere possibility that the coverage will improperly influence the jurors, but rather a serious specified risk of significant injury (not necessarily physical injury) to an individual, or significant impairment of defendant's right to a fair trial.

The trial judge must make explicit findings justifying any abridgement of coverage, and cannot limit cameras more strictly than is necessary to eliminate the anticipated harm.

In the most prominent case denying coverage, the trail judge concluded that were cameras present, the defendant, accused of murdering employees of two abortion clinics, would "use the proceedings as a forum to air his views on abortion and other issues."

The judge can also preclude televising certain pre-trial matters where coverage might affect the poll of potential jurors. These include motions to suppress evidence; motions to dismiss; probable cause hearings; evidentiary voir dire; and jury selection voir dire. As to the latter, although Massachusetts does not permit lawyer voir dire, the judge in certain situations must question each prospective juror individually. This issue arises quite frequently in high-visibility cases.

Whenever either a party or one of the media raises a question about coverage, the rule establishes a mechanism for hearing, notice, and determination, using the Associated Press Bureau in Boston as the clearing house for notice.

The rule strictly governs the mechanics of coverage: no more than one photographic camera and one video camera, both mechanically silent. The judge is not required to arbitrate any intra-media dispute as to pool representation; if the organizations cannot agree, all cameras stay out. To my knowledge, this has not yet happened. In any event, the judge is expressly forbidden to give anyone an exclusive right to cover the proceedings.

Although the rule does not say so, the equipment must only use "available light," without flash bulbs or floodlights. Camera operators may not move unless the court is in recess. They may not photograph or televise closeups of bench conferences, conferences between counsel, or counsel-client conferences. Frontal and close-up photography of the jury is likewise normally forbidden.

In summary, one may safely say that during the 20 years of its existence, the Massachusetts rule—as improved from time to time—has worked well. It has, as interpreted, led to a balancing of interests and to a modus vivendi that has served the public well, protecting the essential values of free press and fair trial.

MASSACHUSETTS SUPREME JUDICIAL COURT

Rule 1:19 Cameras in the courts

A judge shall permit broadcasting, televising, electronic recording, or taking photographs of proceedings open to the public in the courtroom by the news media for

news gathering purposes and dissemination of information to the public, subject, however, to the following limitations:

(a) A judge may limit or temporarily suspend such news media coverage, if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence.

(b) A judge should not permit broadcasting, televising, electronic recording, or taking photographs of hearings of motions to suppress or to dismiss or of probable cause or voir dire hearings.

(c) During the conduct of a jury trial, a judge should not permit recording or close-up photographing or televising of bench conferences, conferences between counsel, or conferences between counsel and client. Frontal and close-up photography of the jury panel should not usually be permitted.

(d) A judge should require that all equipment is of a type and positioned and operated in a manner which does not detract from the dignity and decorum of the proceeding. Only one stationary, mechanically silent, video or motion picture camera, and, in addition, one silent still camera should be permitted in the courtroom at one time. The equipment and its operator usually should be in place and remain so as long as the court is in session, and movement should be kept to a minimum, particularly, in jury trials.

(e) A judge should require reasonable advance notice from the news media of their request to be present to broadcast, to televise, to record electronically, or to take photographs at a particular session. In the absence of such notice, the judge may refuse to admit them.

(f) A judge may permit, when authorized by rules of court, the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, for other purposes of judicial administration, or for the preparation of materials for educational purposes.

(g) A judge should not make an exclusive arrangement with any person or organization for news media coverage of proceedings in the courtroom.

(h)Any party seeking to prevent any of the coverage which is the subject of this Rule may move the court for an appropriate order, but shall first deliver written or electronic notice of the motion to the Bureau Chief or Newspaper Editor or Broadcast Editor of the Associated Press, Boston, as seasonably as the matter permits. The judge will not hear the motion unless the movant has certified compliance with this paragraph; but compliance shall relieve the movant and the court of any need to postpone hearing the motion and acting on it, unless the judge, as a matter of discretion, continues the hearing.

(i) A judge entertaining a request from any news medium pursuant to paragraph (e) may defer acting on it until the medium making the request has seasonably notified the parties and the Bureau Chief or Newspaper Editor or Broadcast Editor of the Associated Press, Boston.

(j) A judge hearing any motion under this rule may reasonably limit the number of counsel arguing on behalf of the several interested media.

Proposed guidelines for media relations during a view

1. If you have a trial in which you anticipate a jury view which video cameras or still photographers may want to cover, conduct a brief conference beforehand (in the courtroom, if possible; at the scene, if necessary) with the media representatives who are covering the in-court proceedings.

2. Bear in mind that a judge cannot forbid photography in a public place or a public street.

3. Request that no reporter, camera operator, or photographer come within 20 feet of any participant in the view, including judge, counsel, court reporter, parties, and jurors.

4. Request that no juror's face be the subject of any picture, still or video.

5. Request that reporters, operators, and photographers communicate only with court officers, not directly with any participant in the view.

6. Instruct court officers to relay to the judge immediately every communication from any media person.

7. Consider informing jurors beforehand (a) that media reporters, video, and cameras may be present during the view; and (b) that you have requested that they take no recognizable pictures of the jurors.

Senator GRASSLEY. Well, thank you very much. I am going to start with Judges Gertner and Zobel.

If you want to make your opening statement, go ahead.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. OK, well, thank you. I am not Judge Gertner, but I want to thank the panel for being here and my good friend, Chuck Grassley, for having this hearing. I told the chairman that we had just come back from a family vacation, part of which was to drive through rural Iowa, something I have always wanted to do. And one end of the State to the other, they lauded Chuck Grassley, and deservedly so.

So I thank you, Mr. Chairman, for having the hearing. The issue of cameras in the courtroom is something that you and I both care about. I hope this hearing will ultimately lead to imminent and effective legislative action.

The principle that has always guided me in this issue and what led me to get involved in it is very simple. I believe that public exposure of the processes of government is virtually almost always in the public's best interest. As Judge Brandeis presciently wrote in 1933, "Sunlight is said to be the best disinfectant. Electric light is the most efficient policeman. It has always been my view that when the people of this Nation watch their Government in action, they come to better understand how our governing institutions work and equip themselves to hold those institutions accountable for their deeds. If there are flaws in our governing institutions, including our courts, we hide them only at our own peril."

Justice Brandeis not only extolled the benefits of shining light on Government. He also wrote that the States should be prized as laboratories for policy experiments. In the case of cameras in the courtrooms, I think it is safe to say that the States have successfully experimented with them and found them to work. Indeed, 48 States now have some form of audio-visual coverage in their courtrooms, and at least 37 televise trials.

Studies and surveys conducted in many of those States have confirmed that electronic media coverage of trials has enhanced public understanding of and confidence in the court system, without interfering with the administration of justice. In my home State of New York, the State courts experimented for 10 years with televising trials, during which time four reports were issued, all recommending that the televising of trials be made permanent.

The most recent report by a legislatively-appointed commission concluded, after extensive study, research and surveys of all participants, that, among other things, one, the presence of cameras did not interfere with the administration of justice. Two, cameras in the courtroom enhance public scrutiny of the judicial system. Three, television coverage enables the public to learn more about the workings of the justice system. Four, television coverage has drawn the public's attention to major societal problems like domestic violence and child abuse. And, five, openness and public access to trials afforded by television works as a safeguard, not as a threat to defendant's rights. In fact, the commission's research revealed not a single appellate decision overturning a judgment, verdict, or conviction based on the presence of cameras at trial.

Finally, six, although television coverage at times could show the judicial system in an unfavorable light, it is not a detriment but rather than opportunity to improve the judicial system.

The most recent New York experience with cameras in the courtroom was at the recent trial of four police officers in the shooting death of Amadou Diallo. The trial had been moved from the Bronx to Albany, but the judge wisely in the case permitted live TV coverage, which allowed anyone who was interested to watch the entirety of the trial, whether they lived in the Bronx or anywhere else.

The televising of that trial, which I can tell you aroused strong passions in my city and my State, was not disruptive. The lawyers acted professionally and the rights of the defendants were not curtailed. Witnesses and jurors were not intimidated by the single camera in the courtroom. In my opinion, the public was done a great service by the judge who allowed them to watch the courtroom processes for themselves.

In fact, the benefits, especially the educational benefits, remain because anyone can go on the Internet at any time and watch a portion of the proceeding and really see for themselves what the evidence was and how the lawyers and judges handled their respective roles.

Judge Teresi's opinion in the Diallo case was a brave one. He opened up his court for all of the public to see a proceeding that was going to be heavily scrutinized and, regardless of the outcome, criticized. But that is just the point. By letting the public in, he ultimately bolstered the integrity of the system itself.

I had hoped to bring Judge Teresi here as a witness, but the scheduling didn't allow it. But here is what he wrote in his opinion, "The quest for justice in any case must be accomplished under the eye of the public. The denial of access to the vast majority will accomplish nothing but more divisiveness, while the broadcast of the trial will further the interests of justice, enhance public understanding of the judicial system, and maintain a high level of public confidence in the judiciary."

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you.

Senator Specter, we have had the first panel. You can have your opening statement now.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman. I regret not being able to be here sooner. We had the Ford-Firestone hearings this morning and that has put everybody back quite a ways with a session which lasted for more than 3 hours.

I wanted to come down and greet the witnesses and to make a comment or two on this very important subject, and especially to welcome Chief Judge Becker of the Court of Appeals for the Third Circuit, and Judge Gertner and Judge Zobel as well. Judge Becker and I went to college together, although he was only a freshman when I was a senior. Then we went to law school together and we have been friends ever since, and I have watched his very illustrious career. This subcommittee is fortunate to have this expert panel.

I saw Judge Becker's statement this morning and I weighed it. I know his position on this important subject, and I wanted to come

down and say a few words about the panel, about Chief Judge Becker, and also about the subject, if I may.

Senator GRASSLEY. You may right now.

Senator SPECTER. Thank you, Mr. Chairman.

I know the sensitivity of the Federal courts about television, and I have some idea of the impact of television on the way lawyers—I guess "perform" is the right word, and perhaps even the way judges perform, and maybe even witnesses, too.

I believe that greater public knowledge of our court system is really very, very important, and I know from talking to Judge Becker that the judiciary sees it differently and his testimony is to the contrary. It is a matter of having enough television exposure so that there is really an idea as to what goes on in a trial courtroom. That is not easy because it is a long process and it is hard to get a sound bite and to understand what is happening.

Similarly, it is hard to get a sound bite of what happens in the Senate. If you just tune into the Senate, it is hard to find out what happens in a very brief period of time. But I have found that there are a lot of people who watch C–SPAN I and II, including some of the parts which are not exactly scintillating. Judge Becker comments about some of the court proceedings being on at 3:00 a.m., and I was surprised to hear that because I thought I had that time reserved for myself, for the insomniacs at 3:00 a.m.

I am hopeful that your legislation will move forward, Senator Grassley, Mr. Chairman. I have been considering for some time legislation which I am in the final stages of preparing. And it may sound a little abrupt on the surface, but I believe that U.S. Supreme Court proceedings ought to be televised.

I believe there ought to be public understanding, not a greater public understanding, just a public understanding, because there is virtually none at the present time as to what the Supreme Court of the United States does. It has been a wonderful institution; it has earned its spot as the number one branch of Government. When the Framers drafted the Constitution, it came under Article III. Congress came in under Article I. I don't even know that Congress would be Article III if the framers rewrote the Constitution.

After *Marbury*, the Supreme Court has the final word, and without going through the long line of decisions, the Supreme Court decides all the important questions, all the cutting-edge questions. They don't come to the Congress, they come to the Court. When life begins, pro-life, pro-choice, death penalty, assisted suicide, you name it—the Supreme Court decides these matters.

I am amazed from time to time. The Washington Post Sunday section lauded the Court as not having an agenda. Now, that is not the U.S. Supreme Court I know. You take what has happened on the tax cases, on States' rights cases, patents and trademarks, and what has happened with the Court invalidating a great many congressional decisions on the ground that we haven't thought them through, haven't given sufficient consideration. I hadn't understood that was a basis for declaring acts of Congress unconstitutional.

I understand when it is at variance with the Constitution or you can pick out the Due Process Clause and construe it in a way, or the Equal Protection Clause or some of the other flexible clauses, but not that Congress hasn't thought it through or that we haven't

given sufficient consideration. I think it is true that we haven't given consideration much of the time, but I don't think that is up to the Court to say. Who is there to say that the Court has given adequate consideration?

So I have been relatively brief, Mr. Chairman. You may not believe that, Senator Schumer and my colleagues, but we are all used to one another. Senator Grassley and I have sat together on this committee for 20 years, and Senator Schumer is only a recent addition to the committee but was in the House for many, many years.

This business about television is very, very important, and public education and public understanding is very important. I hope we can find a way to persuade the circuit courts and the district courts to open up the television line. What I am talking about on legislation is the Congress taking the bull by the horns and legislating the opening up of the Supreme Court, and that involves some very delicate questions as to our authority to do that.

I believe we do, under speedy trial rules or under our ability to create and expand the courts—if the Congress chose to do so, more than nine members or less than nine members—or setting jurisdiction of the Court. *McCardle* says we can even deal with constitutional issues. I don't think that is right, but Congress has very substantial authority. Whatever we do, the Supreme Court will have the last word, but I think we ought to tell the American people as best we can what goes on in our courts.

Congratulations to this very distinguished panel, and thank you, Mr. Chairman, for your courtesy.

Senator SCHUMER. I was just going to thank Judge Specter for his erudition. [Laughter.]

Senator GRASSLEY. Our bill does apply to the Supreme Court, but it does not mandate that the Supreme Court be open to cameras, as it allows it in all instances up to the judge.

Senator SPECTER. Well, I think there is a sound basis for what you have done here, Senator Grassley, Mr. Chairman, and I think that is a start. It may be the way to begin, but we will have some lively discussions and some lively debates. I commend you for your legislative activities, and Senator Schumer, and for moving ahead here.

I will have to ask to be excused because I don't have to tell you how complicated the schedules are, but I did want to come and say hello.

Thank you.

Senator GRASSLEY. Thank you very much, Senator Specter.

We will ask questions now of this panel.

Judges Gertner and Zobel, last year Judge Harvey Schlesinger testified before a House subcommittee on this matter. He said, "The Judicial Conference, after experimenting with and studying the effects of the presence of cameras during Federal civil proceedings, determined that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern. Because the paramount responsibility of a U.S. judge is to guarantee citizens a right to a fair and impartial trial, the Conference concluded that it was not in the interests of justice to permit cameras in the Federal district courtrooms."

Now, in the meantime we have changed the legislation to allow that faces and voices of witnesses be obscured, which would address most of Judge Schlesinger's concerns. I have seen the Federal Judicial Center's report on the pilot done in the early 1990's. The report, while pointing out some concerns, is favorable toward cameras in the courtrooms.

The Judicial Conference, according to Judge Becker, believes that our bill would have adverse effects on court proceedings. He has stated, "We believe that a witness telling facts to a jury will often act differently when he or she knows thousands of people are watching."

So, Judge Gertner and Zobel, how do you respond to the arguments that S. 721 won't protect a defendant's right to a fair trial? We have had 20 years of experience in State courts, which handle over 90 percent of the criminal cases, and it appears to me that these fears have proven to be unfounded. So I would like to have each of you respond.

Judge GERTNER. I think that the anecdotal data that the cases that I indicated I had participated in as a lawyer—I was a criminal defense lawyer and understood that having cameras in the courtroom could have a potential impact, but never felt—and was, I think, as zealous a guardian of my client's rights as there was—never felt that that was a basis for seeking to have them excluded.

I also think that, as I said, the meaningful data is—it is extraordinary that we should ignore the Federal Judicial Conference and we would ignore the data from the State courts, where fairness has not been a problem, where the data for the most part suggests that the proceedings have been dignified and that the judges have perceived them to be fair. And this is now the State courts across the country.

I think that the data from the Judicial Conference pilot program describes some discomfort of some judges in some of the findings that you indicated. But the overall balance of the report was in favor of the continuation of the experiment, notwithstanding that. So the data from the State courts, anecdotal data in my own life as well, and the bottom line—not the reservations expressed, but the bottom line of the pilot program in the Federal courts suggests that these concerns were not material.

You have to deal with witness intimidation as a judge, with the cameras or without, potential threats, witnesses' reservations. And we deal with it, and I don't think that it is a material difference between having televised proceedings versus not.

Senator GRASSLEY. Judge Zobel.

Judge ZOBEL. I can't comment on the virtues, or the reverse, of S. 721. I will say that in the State courts, we do not tend to get many gang-type, mafia-type, organized crime-type cases. We do, however, get a great many rape cases, and the need for the reasonable privacy of the witness, I think, is dealt with by the mechanical means available for blanking out the witness' face.

With respect to the identity of the witnesses, that is revealed in court without a camera. Reporters just have to take the names down. To the extent that we are talking about revealing witnesses' identities, I can't speak for any other court system, but in Massachusetts our rule is that the camera cannot take any close-ups of

the jury; that is, any pictures that would identify the jurors facially. So I don't think, based on my experience, that this is a problem that is disqualifying.

Judge BECKER. Can I respond?

Senator GRASSLEY. Yes, you can, and then I wanted to ask you a question.

Judge BECKER. I will try to do this quickly, both on the State level and then on the Federal level. First of all, there have been a lot of very broad statements made here about the State experience, the suggestion that this is enormously widespread in State courts. The FJC study, which incidentally was not approved by the Conference—the recommendation was a staff recommendation that was never approved and which is at odds with the specific findings. They studied the State court experience.

We have heard a lot about this generally favorable State court experience. First of all, if you study the State court pattern, it is an extreme patchwork quilt. Many of the States don't permit it at all. Most of the States permit it in very limited circumstances. It may be vetoed by a witness, it may be vetoed by an attorney. It is not nearly as widespread as has been intimated here.

Second, we have heard a lot of general approval, but we have not encountered a study of a State court experience with the specificity of this FJC study. Now, the FJC study was responded by a bunch of Federal judges and lawyers, a pretty high-class group, I submit, and they made specific findings about nervousness of witnesses in significant numbers, 30, 40 percent; that to some extent witnesses were nervous, were less willing to testify; that cameras distracted the witnesses, the attorneys. The juries were disruptive; extraordinary theatricality; importuning by the exit interviews of their friends saying, hey, I saw you in this case; affecting judges, affecting witness privacy.

I submit to you, Mr. Chairman and Senator Schumer, that these are very significant factors, and that this FJC study, notwithstanding a generally positive recommendation by staff which was not accepted by the board—it was never submitted to the board; I was a member of the FJC board at the time—and which was rejected by the Conference, belies the general representation as to the experience.

And, of course, as I have also said, the game is not worth the candle. We cannot compromise. We are not talking about a constitutional issue, a violation that rises to a constitutional level. We cannot countenance any degree of unfairness if we are to be faithful to the mission. And the suggestion by the other panel members that the good outweighs the bad is not an allowable balance, I submit.

Senator GRASSLEY. I am going to quote from page 7 of the 1994 FJC evaluation of these pilot projects. On page 7, summary of findings: "Results from State court evaluations of the effects of electronic media on jurors and witnesses indicate that most participants believe electronic media presence has minimal or no detrimental effects on jurors or witnesses."

I am going to go to a question now for you, Judge Becker. You brought up the issue of security, potential harm by terrorists or others to harm judges, witnesses, other participants. I see it as

kind of a "sky is falling" argument. We have had State courts handling some very high-profile cases. Members of Congress have taken high-profile positions against terrorists. Obviously, we have to balance competing goals here, just like we do in hundreds of other areas. We could close the courts or we could close the Congress to be perfectly safe, but we are not going to do that.

So if a presiding judge really believes that cameras would be a security risk in a particular case—and when we are talking about this bill and the Federal courts, we can decide not to have the cameras. Our bill gives total discretion to the presiding judge, so the judge is in charge of the courtroom.

I want you to comment.

Judge BECKER. Terrorism is not something you can predict, Senator Grassley, but the fact of the fact is that in recent years terrorism has been directed against Federal facilities and in some respects Federal courts. The Federal courts, unlike the State courts, are the emblem of national sovereignty that disaffected people want to act against. It is not necessarily in a specific or individual case. It is just the general symbol that is out there.

Now, I am not going to suggest to you that I can predict that it will happen in any given instance, but it is a matter of very great concern. It is a matter of concern not only to the Federal judiciary, but the United States Marshals Service, and I just think it is a factor to weigh in the balance.

Senator GRASSLEY. I have one more question of this panel and then I will turn to Senator Schumer.

Judge Zobel, some argue that cameras sensationalize cases and that attorneys play to the cameras, which affects the case. You have had experience with lawyers trying to control the courts. I think you have indicated that it is really up to the judge.

Could you relate the experiences you have had preventing lawyers from controlling the courts?

Judge ZOBEL. Well, one technique is to look over the tops of my glasses and not say anything. Another is to make it clear, not explicitly but just by general approach to the business of the trial, that we are all here to focus on the trial.

I have to say that I have only had one experience where the lawyer kicked the traces, and after he overlooked a couple of less strong hints, I called him the side bar and I told him in non-profane but unmistakable language that this wasn't going to go on anymore. And for the rest of the trial, everything was peachy.

Judges are paid to keep order in courts. Sometimes they use gavels, sometimes they raise their voices. The late Judge Julian of the Federal court in Boston had a wonderful technique of just standing up and spreading his arms. And when you saw that figure with the black robes extended, it looked like Batman come into the courtroom and it kept everybody right on the line.

Senator GRASSLEY. I now turn to Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman, and I appreciate everybody's testimony and effort here.

I guess the first question I have for Judge Becker is the bill that the House passed recently requires the consent of all parties before cameras would be allowed. I guess this is a two-part question. Why doesn't leaving it in the discretion of the judge, and certainly why

wouldn't a provision that required the consent of all parties before cameras were allowed in the courtroom deal with the concerns that you brought up?

Judge BECKER. Well, leaving aside the very practical problem, Senator Schumer, that I think you are rarely going to get the consent of all parties, there are two further considerations. First of all, you never know what is going to happen in a trial. Second, I think you either have a policy or you don't have a policy, and it strikes me that leaving it to the discretion of individual judges, you are going to have a lot of inconsistent results and a lot of tension and all the rest of it.

But the bottom line, the baseline point is that even if everybody consents, if these findings that are in the FJC report, which I think are highly credible, are true, you have an impairment of the process. And what do you get for it? What you get for it is 56 seconds, tops, on the nightly news, one-third of which is trial footage. The game is not worth the candle.

What you are getting for it if you are doing a balancing, which my statement suggests is not allowable because we can't allow any unfairness to creep into a trial—what you are getting for it is 56 seconds, tops, really 33 seconds on the nightly news. The courtroom is just a backdrop, and if you have the cable operators, what you get is little smidgens interspersed with commentary and commercials.

Indeed, I spoke to one of the Ninth Circuit judges whose arguments were televised and I said, tell me what kind of feedback do you get. He said, well, I had a friend who was up at 3:00 a.m. He said it was a wonderful education for insomniacs. But I mean gavel-to-gavel coverage is extraordinarily rare. What you get out of this is a lot of nothing. What you get out of it is 56 seconds on the nightly news, and from time to time you get portions of the trial interspersed between commercials and commentary, and the game is not worth the candle.

Senator SCHUMER. Just a follow-up. You heard my comments about the Diallo case in Albany. You didn't get 56 seconds on the nightly news. You got that, but in addition you got the trial fully available on cable for people. In addition, what you really got was that everyone had the opportunity to see what was going on in the courtroom. Here, you had a venue change that many people were extremely upset with, and it punctured, or at least allayed the fear that people had and did a great service.

So I think when you are saying 56 seconds of nightly news, that may occur sometimes. But when it is all open to the public, when it is all open to cameras, that is not always going to be the case. I mean, I can't tell you the amount of good that Judge Teresi did by allowing cameras in the court there, but it was significant. I could paint for you a parade of horribles that might have occurred had he not been allowed to do that, and it was again solely in his discretion.

Judge BECKER. I did not see that and I am not familiar with it, but the 56 seconds I talk about was the result of a study of all of the media takes and out-takes and media use of 3 years of a pilot project. Now, of course, it depends on the case.

Senator SCHUMER. That is an average, I presume.

Judge BECKER. That is right. The case that you describe——

Senator SCHUMER. That is like saying every American makes $39,311.

Judge BECKER. No, but the case that you describe is a rarity. The TV nightly news does not allow itself—I mean, just analyzing, it isn't going to allow itself more than 56 seconds. So if you eliminate that, which is maybe 90 percent of it, the question then is the cable operators.

Now, once in a blue moon you are going to get a trial like the Diallo trial. The Diallo trial might have been a good example. The Simpson trial was not. The judges in the Eastern District of Pennsylvania who participated in this experiment tell me that in terms of the selection of cases, they wanted the sexy cases. They didn't want the cases where maybe there was more public policy.

An example was a products liability case where the question was whether a major automobile manufacturer wanted to save 8 cents on an item and somebody was killed. That was not the subject. There is going to be a rare case like that, but I submit to you, Senator, that more often than not you may have a Simpson effect in that kind of a case.

And even though that case seemed to go down OK, the only thing I can tell you is these studies by a bunch of very responsible Federal judges, every one of whom was confirmed by the Senate Judiciary Committee so they must have been pretty good—this study shows these kinds of effect, and I read them before, on theatricality and disruption. We are dealing with a policy decision, and as a policy matter we think we ought not to go that route.

Senator GRASSLEY. Judge Zobel.

Judge ZOBEL. Thank you, Mr. Chairman and Senator Schumer. Could I ask if the Federal experiment included criminal cases, or was it just civil cases?

Judge BECKER. Just civil, not criminal.

Judge ZOBEL. Well, that probably accounts for the 56 seconds, I would think. There are very few civil cases that draw much attention.

Judge GERTNER. But also if I might add——

Senator SCHUMER. Go ahead, Judge.

Judge GERTNER. If it is the case that cameras in the courtroom has become so ordinary that for the most part it is not covered very much on the evening news, then the impacts that are projected from having cameras in the courtroom are not likely to be there. If it is not likely that every nuance of the trial is going to be covered in the evening, then I can't see that over time the concerns about theatricality will, in fact, occur.

Now, to allow then for the discretion for the major case—and I completely agree with you, Senator Schumer, that the Diallo case was a perfect example because there was a concern about the legitimacy of the proceedings. And unless the public saw the proceedings as far and legitimate, they would not have accepted the results. So it seems to me to allow even the exception is what this bill is about.

Senator SCHUMER. Thank you, Judge Gertner.

I think, in all due respect, Judge Becker, you are on a little bit of a slippery slope when you say you can't do any balancing, that

the fairness of the trial is the only value that we have to look at here even if some good might occur. We can debate how much.

I mean, I am looking here at the summary of your statement, and I apologize to all of the witnesses for missing the initial statements, which I managed to read. Let me ask you, you could make the same argument against public trials. Here they are. Among those reasons supporting the Conference's position are the following: the intimidating effect of cameras on litigants, witnesses, and jurors. I would argue to you that there would be less of an intimidating effect if the trial were in a star court chamber, if it were totally closed in some way.

Allowing cameras could interfere with a citizen's right to a fair trial. You are certainly going to get that argument made when you make a trial public.

Permitting camera coverage would almost certainly become a negotiating tactic. If we were to make it discretionary to keep the trial open, that could be a negotiating tactic.

Theatrics. I would argue to you I have met, as you have, many lawyers who are playing to the public whether there is a camera in the courtroom or not. Close the trial, don't make it public, and you will stop more theatrics.

I mean, my point is somewhat rhetorical, but I still think valid, and I would like you to address this idea that you can't balance. That seems to me to be a fundamentally flawed argument that would lead us to close the courtrooms to any public openness. Leave out print reporters, leave out any non-relevant witnesses, non-testifying witnesses.

Could you address that for a minute?

Judge BECKER. Certainly. I respectfully and strongly disagree. First of all, leaving aside that the Constitution requires a public trial——

Senator SCHUMER. I am sure the Founding Fathers balanced the benefits of having it open to the liabilities of having it open.

Judge BECKER. But they came up with what is in our fundamental document. I submit, Senator, that there is a huge difference between the effectiveness in a courtroom with 5 people, 10 people, 50 people in the courtroom, and being viewed by tens or hundreds of thousands or perhaps even millions of people.

Judges are in the business of line-drawing. That, to me, is an easy line to draw. We have not had problems—I presided over trials for 11 years—with a public trial. But it is exponentially quantitatively, qualitatively different when you have got television and you have got tens, hundreds of thousands, millions of people——

Senator SCHUMER. Would you make the same argument about still photographers or even a print reporter being read the next day by tens of thousands or hundreds of thousands of people seeing your picture?

Judge BECKER. A page of history, as Holmes said, is worth a volume of logic. We have got books full of history and have had no problems with public trials. Television we have had other problems with.

In terms of your question about the balance, I submit to you that our most solemn duty is to assure that there is a scrupulously fair

trial for all concerned. Now, if you were to say to me that the impact of television was minuscule, if we are talking about something which is a scintilla, if it is minuscule at that point there is an old maxim, de minimis non corat lex.

But when you start to get some substantiality into it, and our study reflects that there is considerable substantiality, then I submit that a balance is not appropriate. And we are talking—and this was one of my baseline premises in my oral statement—we are not talking here necessarily about the degree of unfairness that will result in a constitutional deprivation. That is easy.

But there are lower levels; there are levels of unfairness that don't amount to a constitutional deprivation. And if they are in any degree significant, then I submit that as a policy matter—I am not here as an individual adjudicator, but as a policy matter that ought not to be balanced about the supposed public good. I have suggested that in the overwhelming majority of the cases, it is illusory.

Senator SCHUMER. Do you generally apply this rule that there should not be balance, or just in this particular instance? I find it a curious notion.

Judge BECKER. Senator, judges balance all the time.

Senator SCHUMER. Of course.

Judge BECKER. That is what we do, but we know when to balance, and there are times when you don't balance. The judging business is a line-drawing business. To me, the line is relatively clear. But you are a lawyer and a graduate of a distinguished law school as well, so you know how to balance, and so does the chairman.

Senator SCHUMER. You know what they say, judge. The best thing about going to Harvard is when somebody else tells you they went to Harvard, you are not impressed. Because they took you, they could take anybody.

Thank you, Mr. Chairman.

Senator GRASSLEY. We thank you very much for your expert testimony, and the only admonition I have is that you may get some questions in writing. Thank you very much.

Judge GERTNER. Thank you.

Judge BECKER. Thank you. It was a great pleasure to be here. I appreciate your courtesy.

Senator GRASSLEY. It is our job to be courteous. I am not sure we always are, but we ought to be.

Now, would everybody on the second panel come because you can be seated, then, while I am introducing you?

Our first witness is Lynn D. Wardle, Professor of Law, J. Reuben Clark Law School, Brigham Young University, Provo, UT. A graduate of Duke Law, Professor Wardle has done extensive research on media coverage of courtroom proceedings, beginning when he served as a law clerk for Judge John Sirica, and that was at the U.S. District Court for the District of Columbia here, and that was May 1974 through May 1975. That was during the Watergate investigation. He also served part-time as judge pro tem, Eighth Circuit Court, Provo, UT, hearing civil cases.

Next to testify is a constituent of mine, Dave Busiek. Mr. Busiek is News Director for KCCI–TV, a CBS affiliate, Des Moines, IA; a member of the Radio-Television News Directors Association, and

has served on the board of directors now for the past 8 years. Mr. Busiek has also been a television reporter and anchor.

Finally, Mr. Ronald Goldfarb. He will speak before this subcommittee because he is a lawyer and author on this subject. He lives here in Washington, DC. He was a prosecutor and defense counsel in the U.S. Air Force; a member of the Organized Crime Section, U.S. Department of Justice, during the Kennedy administration. Mr. Goldfarb is the author of 10 books, including one entitled *TV or Not TV: Television, Justice, and the Courts*.

Now, we are going to go with Professor Wardle, my constituent, and then counselor Goldfarb.

Would you proceed, professor?

PANEL CONSISTING OF LYNN D. WARDLE, PROFESSOR OF LAW, J. REUBEN CLARK LAW SCHOOL, BRIGHAM YOUNG UNIVERSITY, PROVO, UT, DAVID BUSIEK, NEWS DIRECTOR, KCCI TELEVISION, DES MOINES, IA, ON BEHALF OF THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; AND RONALD GOLDFARB, WASHINGTON, DC

STATEMENT OF LYNN D. WARDLE

Mr. WARDLE. Thank you, Mr. Chairman and distinguished members of this subcommittee, Senator Schumer. My name is Lynn Wardle. I am a Professor of Law at the J. Reuben Clark Law School, Brigham Young University, and I am very honored to appear before this subcommittee and present a statement in support of the bill. My modest contributions are based on my own experience and some research that I have done in the area.

There are four reasons why I believe that Senate bill 721 should be enacted. It is good for the courts. It is good for the public. It preserves appropriate judicial discretion, and the experience of 48 State courts with cameras in the courtroom has shown that it is doable and that it is worth doing.

First, it is good for the courts. A fundamental principle of the U.S. judicial system is that our courts are open, public, and accessible. Federal judges are given significant authority in our system of Government, and it has been very important that they not become isolated and remote from the people.

As Justice Harlan once wrote, "It is desirable that the trial of causes should take place under the public eye, that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

Public access to Federal courts, including access by camera, preserves and protects the integrity of the Federal judicial system. Public viewing of trials aids the fact-finding process, fosters the appearance of fairness, and heightens public respect for the judicial process.

As the Supreme Court noted in *Richmond Newspapers*, public access is, "an indispensable attribute of an Anglo-American trial," because it gives, "assurance that the proceedings are conducted fairly to all concerned, and it discourages perjury, misconduct of participants, and decisions based on secret, bias, or prejudice." Cameras make the real justice system visible to the citizens who support that system.

Second, it is good for the public that Federal court proceedings are open, accessible, and generally visible. It is good because civic education results. Most Americans, particularly young Americans, want to see the courts in action. They want to know exactly how does the court system work. Our citizens should be able to personally observe the Federal judicial process. That kind of experience makes citizens more informed, more realistic, gives them a more accurate understanding of the judicial process, reduces anxieties, and makes them less fearful about being participants in the judicial process.

Some persons who have a right to be in the courtroom but cannot be there for very good reasons, such as health or finances or other commitments such as caring for aged parents or children—for example, victims of crimes and their families—often desire to be there, but cannot be physically present. Cameras allow them to be present through the camera lens.

Public awareness of judicial behavior is one of the assumptions on which the primary constitutional safeguard—namely, Article III "good behavior" standard for retention of Federal judges—is based. It is important that we be able to observe the behavior of Federal judges. That is the assumption on which that safeguard is predicated.

Moreover, when the public is excluded, suspicions are aroused. As the Supreme Court noted in *Richmond Newspapers*, "Where the trial has been concealed from public view, an unexpected outcome can cause a reaction that the system at best has failed or, at worst, has been corrupted."

I think Senator Schumer's example of the Diallo case is a prime exhibit of that reality. There was an unexpected outcome, and if that proceeding had been concealed from the public, there may have been concerns that, well, this is unfair or a corrupt process. But because the citizens had the opportunity to see and realized it was a very difficult issue and difficult decision, the reaction was much more muted, much more moderate.

Third, Senate bill 721 focuses on the fundamental policy issue by preserving judicial discretion. It only addresses the question, should a judge have the discretion to permit the use of cameras in the courtroom. It doesn't try to micromanage the resolution of all of the questions relating to the use of cameras in the courtroom, but leaves the resolution of those issues to the persons in the best position to answer them, namely judges.

Now, that is a very astute point, I believe, because there are significant questions and very powerful concerns that have been expressed by people about cameras in the courtroom. Those concerns do not go to whether cameras should be in the courtroom, but rather how they should be in there, when, under what circumstances, under what restrictions.

Now, Congress might propose some guidelines. It might say, here is what we think. But, instead, Senate bill 721 says we don't want to micromanage the courts; let the judges make those decisions themselves, let the Judicial Conference propose guidelines. I think that is much more appropriate than having the legislature make that decision.

Two hundred years ago, a Federal court in an urban area open to newspaper reporters and people in the market would be fully accessible to the public. But today times have changed. We depend heavily on technology for access, and I am not sure that it can be accurately stated that a downtown urban court is fully accessible and fully public if we ban cameras as a blanket rule.

The third point I have already mentioned, and the fourth is the experience of 48 courts with cameras in the courtroom can't be ignored. According to the National Center for State Courts, 48 States allow cameras in the courtrooms, with 35 allowing them in criminal cases. The point is we have experience, we know it can be done. Yes, there are concerns, but those concerns can be addressed by capable judges exercising wise judicial discretion.

For these reasons, and for the other reasons expressed in my statement that I ask to be included in the record, I favor the passage of S. bill 721.

Thank you.

[The prepared statement of Mr. Wardle follows:]

PREPARED STATEMENT OF LYNN D. WARDLE

Mr. Chairman, and distinguished members of this Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee:

My name is Lynn D. Wardle. I am a professor of law at the J. Reuben Clark Law School, Brigham Young University.[1] I am honored to appear before this subcommittee to present a statement in support of S. 721.

The issue of cameras in the courtrooms of American courts has been extensively debated in recent years. For example, my computer search of American law review found over 125 articles, notes, and comments published on the subject in the past 10 years alone.[2] My modest contribution to this debate is based on my experience and research, which is not unique but which may be helpful. I have worked as a

[1] I graduated from Brigham Young University in 1971 (B.A.) and from Duke University School of Law in 1974 (J.D.). I was on the duke Law Review (Director, Writing Competition) and also on the Duke Law School Moot Court Board of Advocates. I served as a law clerk to the Hon. John J. Sirica of the U.S. District Court for the District of Columbia from May 1974 through August 1975 (during the Watergate coverup case and some related cases), practiced civil litigation with the law firm of Streich, Lang, Weeks, Cardon & French (now Quarles & Brady Streich Lang) in Phoenix, Arizona from 1975–1978 (representing corporate and individual clients in a variety of commercial cases), and also worked in the U.S. Department of Justice, Civil Division, Federal Programs Branch in Washington, D.C. (Professor-in-Residence, 1989–90) (representing federal agencies sued in federal courts). For nearly three years I served as a Judge pro-tem, Eighth Circuit Court in Provo, Utah hearing small claims civil cases. Since joining the faculty of the Brigham Young University School of Law in 1978 I have taken over 100 pro bono cases, and written nearly a dozen *amicus curiae* briefs, and taught as a Visiting Professor or Visiting Researcher in law schools in Scotland (1985), Japan (1988), Washington D.C. (1990–91), and Australia (2000). I taught Civil Procedure for a dozen years, and teach Conflicts of Laws and a Seminar on the Origins of the Constitution among other subjects.

[2] I searched the "JLR" database in Westlaw for publications since 1990 containing the word "cameras" within 10 words of "courtroom" and came up with 126 publications (Aug. 29, 2000). With the help of my research assistant, Catherine DeGaston, I have reviewed a number of these, and relied on several, including: Duane A. Bosworth II, Alonzo B. Wickers IV, Jeffry H. Blum and Anke E. Steinecke, *Report from the 5th Annual Conference,* Communications Lawyer, Summer 2000, at 28; Michael J. Grygiel, *Memorandum of Law of Regional News Network in Support of Its Motion for Limited Intervention and Application to Provide Audio-Visual Coverage of Trial Proceedings,* 63 Albany L. Rev. 1003 (2000); Stacy R. Horth-Neubert, Note, *In the Hot Box and on the Tube: Witnesses Interests in Televised Trials,* 66 Fordham L. Rev. 165 (1997); Kathleen M. Krygier, *The Thirteenth Juror: Electronic Media's Struggle to enter State and Federal Courtrooms,* 3 CommLaw Conspectus 71 (1994); Laurie L. Levenson, *Cases of the Century,* 33 Loyola L.A. L. Rev. 585 (2000); James M. Linton, *Camera Access to Courtrooms: Canadian, U.S., and Australian Experiences,* 8 Can. J. Communica. 1 (1993); Francis T. Murphy, *Televised Criminal Trials May Deny Defendant A Fair Trial,* N.Y. State Bar J., Mar/Apr 2000, at 56; Leonard E. Noisette, New York State Committee to Review Audiovisual Coverage of Court Proceedings: Minority Report (April 1, 1997); Jennifer L. Reichert, *New York Judge Rules Ban on Cameras in Court Unconstitutional,* Trial, May 2000, at 98; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III,* 113 Harv. L. Rev. 924 (2000); Ralph E. Roberts, Jr., Comment, *An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings,* 51 S.M.U.L. Rev. 621 (1998).

lawyer for the federal government, and done legal work for state governments; I have represented large corporations in private practice and have done extensive pro bono work representing private individuals; I served as law clerk to a federal judge during a major criminal trial, and served as a judge pro tem in a state court hearing minor civil disputes; I have been a law professor for more than 22 years; my interest in the subject dates back 25 years to my days as a law clerk for Judge Sirica who decided a seminal case about media access to evidence in federal court.[3]

There are four reasons why I believe that S. 721 should be enacted to permit federal judges to decide case-by-case whether, when, and under what conditions to permit cameras in their courtrooms. It is good for the courts; it is good for the public; it prudently addresses only the basic policy issue while preserving judicial discretion; and the experience of 48 state courts with cameras in courtrooms has shown that it is do-able and worth doing.

First, it is good for the courts. A fundamental principle of the United States judicial system is that our courts are public, open, and accessible. Judges are given significant authority in our system of government, and it is important that they not become isolated and remote from the people whose legal will (legislative and constitutional) they are appointed to uphold. Because federal judges are *not* directly accountable to the people, as many state judges are, by having to stand for election (either in contested judicial elections or for retention votes), because they usually work in the refined atmosphere of some intimidating (even daunting) courtrooms, surrounded by strict security, because most of their daily interaction is with a highly-paid, rather elite lawyers, because much of their work consists of legal research, analysis, and writing which is a lonely work, and because modern society provides few opportunities for ordinary citizens who are not parties or witnesses in federal suits to observe federal judges at work, it is not unfair to say that federal judges work in relative isolation. Yet they exercise, at least in their own courtrooms, and at least in the short run, awesome legal power and are asked to resolve legal disputes of tremendous importance (some involving billions of dollars, the fortunes and futures of individuals, families, companies, and industries, and fundamental issues of government policy). It is best for that power to be exercised openly, and for as much of the judicial process to occur in full public view whenever reasonably possible without undermining the administration of justice. As Justice Brandeis once stated, "Sunshine is the best disinfectant.[4] It is good for the courts and for the country to eliminate "defective information" about the courts, the law and the cases they decide.[5] Public access to federal courts including access by camera preserves and protects the integrity of the federal judicial system.

As Justice Harlan once wrote, "It is desirable that the trial of causes should take place under the public eye . . . that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[6] The public has "First Amendment interests that are independent of the First Amendment interests of speakers (in this instance, the parties to the trial)"[7] Public viewing of trials aids accurate fact-finding and furthers the public purposes of trials.[8] Allowing cameras in the courtroom "enhances the quality and safeguards the integrity of the fact-finding process."[9] "fosters an appearance of fairness,"[10] and heightens "public

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[3] United States v. Mitchell, In Re N.B.C., 397 F. Supp. 186 (D.D.C. 1976), *rev'd* 551 F.2d 1252 (D.C. Cir. 1976), *rev'd sub nom* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[4] Louis Brandeis, Other People's Money, And How the Bankers Use It 92 (1914), *cited* in Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government,* 14 Yale J. on Reg. 451, n. 110 (1997).

[5] Alexander Hamilton wrote in *The Federalist Papers* about "all the ill consequences of defective information" relating to knowledge of the courts, the law, and facts of particular cases in criticizing proposals for legislative control or revision of the decisions of federal courts. The Federalist Papers, No. 81 (Hamilton), at 483–484 (New American Library, Clinton Rossiter ed., 1961). The same dangers might be said to arise from any uninformed body exercising influence over the federal courts.

[6] Cowley v. Pulsifer, 137 Mass. 392, 294 (1998) (Holmes, J.), *quoted in* Craig v. Harney, 331 U.S. 367, 374 (1947); Gannett Co. v. DePasquale, 443 U.S. 368, 429 n. 10 (1979) (Blackmun, J., concurring & dissenting).

[7] Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16, 19–20 (2d Cir. 1984), *citing* First National Bank v. Bellotti, 435 U.S. 765, 777 (1978); Bates v. State Bar, 433 U.S. 350, 364 (1977); Young v. American Mini Theatres, Inc., 427 U.S. 50, 76 (1976) (Powell, J. concurring); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) (First Amendment "protection . . . is to the communication, to its source and to its recipients both").

[8] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596–97 (1980) (Brennan, J., concurring). *See also* Krygier, *supra* at 83.

[9] *Globe Newspaper*, 457 U.S. at 606.

[10] *Id.*

respect for the judicial process,"[11] while permitting "the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self government."[12] In Richmond Newspapers, Inc. v. Virginia, the Supreme Court noted that court openness to public access is "an indispensable attribute of an Anglo-American trial" because it gives "assurance that the proceedings were conducted fairly to all concerned, and it discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or partiality."[13] Cameras made the *real* justice system visible.[14] The Supreme Court noted 53 years ago, "A trial is a public event. What transpires in the court room is public property."[15] Thus, S. 721 may protect and preserve the integrity of the federal courts by making them more open, more public, more visible, and more accessible to more Americans.

Second, it is also good for the public that federal court proceedings are open, accessible, and generally visible. It is good because of the civic education that results when citizens witness the federal courts in action. I believe that most Americans, particularly young Americans, want to see the courts in action, want to know more about how the courts really work, how lawyers present facts, how judges apply the law, what the role of witnesses, jurors and parties are in trials. They also want accurate information about what really happens, not merely the dramatized and sensationalized entertainments prepared and disseminated for media-profit. Citizens of this great Republic should be able to personally experience as ordinary observers the federal judicial process, to see the federal courts in action.[16] That kind of experience make citizens more informed, more realistic, and gives them a more accurate understanding of the judicial process (which also is good for the nation and for the courts). That kind of experiential information also reduces anxieties and makes them less anxious, less fearful about being participants in the judicial process (as jurors, witness, or parties).

Some persons who have the right to be in the courtroom who often cannot be there because of good reasons—such as financial reasons (they must work and cannot afford to take the time off), health (they are physically unable to make the trip to the courtroom or sit there for extended periods), family commitments (they are caring for dependent children or aged parents or others in their homes and cannot leave for an entire day, week or longer), etc. For examples, victims and families of crime victims may have the right and often the desire to see the justice system in action,[17] but may not be able to spend hours, days, or weeks in a federal courtroom.

Public awareness of court proceedings and judicial behavior is the assumption on which is based the primary Constitutional safeguard intended "to secure the steady, upright and impartial administration of the laws."[18] That, of course, is the provision of Article III that "good behavior" is the standard for retention in service of federal judges. Thus, it is important that the public be able to observe the behavior of federal judges. When the public is excluded suspicions are aroused.[19] Thus, when Justice Joseph Teresi set aside a New York law barring the use of broadcast cameras in the Diallo murder trial,[20] and permitted the proceedings to be televised, there was concern that it would inflame some citizens; when the jury acquitted the defendants, there was fear that it would lead to widespread rampage. In fact, the mild

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[11] *Id.*

[12] *Id. See* Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984).

[13] 448 U.S. 555, 569, 578 (1980).

[14] Levenson, *supra* at 610.

[15] Craig v. Harney, 331 U.S. 367, 374 (1947).

[16] Two hundreds years ago, it could be said that federal courts were open, public and fully accessible if the courtrooms were situated in urban centers near the major markets where farmers and tradesmen came to sell their commodities, near where merchants sold their wares, close to where financiers and professionals transacted their business, etc., and if newspaper reporters could witness and report the proceedings. Then, "fully accessible" meant accessible to personal presence or to the print media. Times have changed. Today, not only does technology expand our accessibility, but it has expanded our activities and commitments so that we depend heavily upon that technology for access (and not solely upon personal presence and print media). I am not sure that it can be accurately stated that a downtown urban federal courthouse that is accessible to personal presence and the print media only is "fully accessible" to the public today.

[17] See Victims' Rights and Restitution Act of 1990, Pub. L. 101–647, 104 Stat. 4820 (codified at *inter alia* 42 U.S.C. § 10606(b)(3), (4), (7) (1990); *see also* Pub. L. 101–647 § 506 (5) & (6) (Victims of Crime Bill of Rights).

[18] The Federalist Papers, No. 78 (Hamilton), *supra* at 465.

[19] As the Supreme Court noted in *Richmond Newspapers*, "[W]here the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. . . . People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. at 571–72. *See* Lucy A. Dalgish & Gregory H. Kahn, Letter to Hon. Robert M. Murphy, Jr., (Feb. 28, 2000).

[20] People v. Boss, 701 N.Y. S.2d 901 (N.Y. Sup. Ct., Alb. Cnty, 2000).

public discontent following that verdict has been attributed by some to the fact that the public had been able to see both sides of the case and realized that the issues were very complicated and difficult.[21]

Third, S. 721 focuses solely on the fundamental policy issue, and preserves the discretion of the judges presiding in particular cases. It addresses only one question: should the law permit a federal judge presiding over a case to allow the use of cameras in the federal courtroom when he deems it to be in the public interest and consistent with considerations of constitutional rights, wise policy, and the fair administration of justice? S. 721 determines that neither the Constitution nor wise public policy mandates a blanket prohibition on judges allowing cameras in federal courtrooms.

Even more importantly, S. 721 does not try to micromanage the resolution of all questions relating to cameras in the courtroom, but leaves the resolution of those issues to the persons in the best position to best answer them—the judges presiding in the particular case—and authorizes them to act on a case-by-case basis. Thus, the bill preserves the discretion of the judge presiding in the particular case or proceeding to see that justice is done in each and every case. This bill in no way undermines the power of those judges to restrict, condition, or even ban the use of cameras in any particular case, or even in all cases if they feel that is appropriate. It does not negate the authority of judges to issue legitimate time, place or manner restrictions on the use of cameras, nor preclude the banning of cameras when a judge in his or her discretion believes that is warranted.[22]

S. 721 does not preclude the Judicial Conference from proposing guidelines for the use of cameras in federal courts. In fact, the Bill authorizes such Guidelines and I would encourage the Judicial Conference to prepare such guidelines. In fact, it might even go one step further and propose a system for recording and televising the proceedings in federal courts comparable to C–SPAN, which I consider to be a very successful, appropriate, and dignified approach to the use of cameras to convey to the public important governmental proceedings in the public interest.

S. 721 is an extremely modest bill, containing a very generous (in my opinion, over-generous) exception for witnesses to demand identity protection, authorizing the Judicial Conference to issue guidelines, and containing a three-year sunset provision. In short, it is a very careful, prudent approach to moving ahead cautiously in a complex area. I believe that S. 721 is clearly within the power of Congress. For over two hundred years, Congress has exercised the authority to establish rules and standards governing judicial proceedings in the federal courts (particularly district courts and courts of appeals).[23]

Fourth, the experience of forty-eight states with cameras in the courtroom cannot be ignored. Forty-eight states allow the use of cameras in state courtrooms under a variety of rules and conditions. None of those states has been so dissatisfied with the experience to repeal the rules allowing cameras in the courtroom; rather, the courts and commentators report generally very positive experiences.[24] Reports on the effects of cameras in state courts consistently show that it is manageable and that there are no significant detrimental effects on witnesses, jurors or others involved. Likewise, the 1994 Federal Judicial Center report on the three-year pilot program in sine federal courts noted "small or no effects of camera presence on par-

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[21] Reichert, *supra* at 98; Lucy A. Dalgish & Gregory H. Kahn, Letter to Hon. Robert M. Murphy, Jr., (Feb. 28, 2000).

[22] Even when there is tremendous media coverage of a case, the court has the power to maintain normalcy in the courtroom." Levenson, *supra*, at 610.

[23] *See* 28 U.S.C. §§2, 48, 138–141 (terms and times of courts); §1652 (rule of decision act), *id.* §2071 (rules authorization); *id.* §§1781–84 (evidence); *id.* §1781 Note (Convention on the Taking of Evidence Abroad in Civil or Commercial Matters); Federal Rules of Civil Procedure; Federal Rules of Evidence; *see generally* 28 U.S.C. *passim.*

[24] According to the National Center for State Courts, forty-eight states allow cameras into the courtrooms, with thirty-five of those states allowing cameras into the criminal courtroom. Many states require a showing of prejudice by the defendant to warrant the removal of cameras from the courtroom. Two states, Mississippi and South Dakota, do not allow cameras in the courtroom, and those states do not have any pending rules that would allow cameras in the courtroom. Several states are modifying the use of cameras in the courts, either by proposing legislation that will further restrict the use of cameras or by expanding the use of cameras in the courts. The California Judicial Council, for example, recently adopted Rule 980 of the California Rules that will allow judges to retain discretion over the use of cameras in their courts . . . . Roberts, *surpa,* at 628. *See also* Krygier, *supra* at 76 (noting 47 states allow cameras in state courtrooms in 1994); Statement of Sen. Leahy, Cong. Rec. S. 3449 (Mar. 24, 1999). In fact, the trend toward allowing cameras in the courtroom began with a resolution adopted by the U.S. Conference of Chief Justices in 1978 favoring cameras in the courtroom; in 1982 the ABA reversed its support for banning cameras from courtrooms. Linton, *supra* at .

ticipants in the preceding, courtroom decorum, or the administration of justice."[25] "Most of the justices who were interviewed . . . thought that educating the public about the workings of the federal courts was the greatest potential benefit," and court administrative liaisons expressed satisfaction with the pilot projects.[26]

Thirty-five years ago, the Supreme Court crystallized a policy against cameras in federal courts. At that time, Justice Harlan foresaw that with time and experience, the media would mature in its methods of covering trials, and the public would become more comfortable with the presence of cameras in their lives. He wrote: "The day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process." [27] Today, with ubiquitous airwaves television, extensive cable TV systems, 500-channel satellite television networks, tens of thousands of internet "broadcasters," when cameras in people's homes are used in television broadcasting of "real life" programs, and when security cameras for recording evidence are common in courtrooms, the day foreseen by Justice Harlan has come. The presence of discreet cameras in courtrooms is generally not disruptive unlike thirty-five years ago.[28] It is time for the federal courts to change their policy to provide a valuable service to the public and to the judicial process that now can be provided without hampering the administration of justice.

I am aware that there are serious reservations about allowing cameras in federal courts and potentially serious problems that might result from mismanagement. Some experienced judges and judicial administrators have expressed thoughtful objections to cameras in the courtrooms. Some of these concerns are worth noting here.

(1) Allowing cameras in the courtroom will add to the administrative work of the judges who will need to spend some time overseeing the use of cameras in the courtroom.[29]

(2) It could make empaneling and protecting juries from exposure to improper information more difficult and more expensive, especially in retrials.[30]

(3) The presence of cameras in the courtroom may have a distorting psychological effect on witnesses, parties, jurors, lawyers and even judges; in some cases, witnesses, parties, or jurors or others may be intimidated by knowing that their faces, voices and testimony will broadcast widely.[31]

(4) The presence of cameras and media have sometimes historically been associated with creating a "circus atmosphere" in courtrooms, impairing a defendant's right to a fair trial.[32]

(5) The media may distort the presentation of the trial,[33] by selective editing reporters and editors may have a very biased, prejudiced, unfair and inaccurate view

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[25] Krygier, *supra,* at 80, citing Molly Johnson & Carol Krafka, Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals 7 (1994).

[26] *Id.* at 24, 31–32, cited in Krygier, *supra* at 80.

[27] Estes v. Texas, 381 U.S. 532, 595–97 (1965) (Harlan, J., concurring).

[28] Krygier *supra* at 71.

[29] *Westmoreland,* 752 F.2d at 25, *citing* Chandler v. Florida, 449 U.S. at 574.

[30] *Id.*

[31] *Id. See also* Noisette, *supra,* at 4 (noting especial concerns in cases involving sex crimes and domestic violence; also noting that a survey reported that most voters would not want trials in which they were parties, witnesses or victims to be televised); Statement of Judge Harvey Schlesinger, Chairman, Committee on Magistrate Judges, Statement on Behalf of the Judicial Conference of the United States on the Federal Courts Improvement Act (H.R. 1752) "http://www.house.gov/judiciary/sch10616.ht" ("the potentially intimidating effect of cameras on some witnesses and jurors").

[32] *Westmoreland, id.* The O.J. Simpson trial is one recent "bad example" of inept management of the use of cameras in the courtroom; the 1950s trial of Sam Sheppard is another one.

> The ban on cameras in the courtroom can be traced back to the sensational Lindbergh baby kidnaping case of 1935. . . . The media's constant and disruptive presence in the courtroom threatened the defendant's constitutional right to receive a fair trial. [T]he media frenzy surrounding this case sparked the debate on the constitutional right of the press to have access to trials.
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> . . . In 1937, the [American Bar Association's] House of Delegates adopted Canon 35 of the Judicial Canon of Ethics, barring all still photography and cameras from the courtroom. . . .

Krygier, *supra* at 72.

[33] Noisette, *supra* at 3 ("the overwhelming majority of footage of court proceedings actually consists of short features—snippets, which shed little light on the complexity of court proceedings.")

of the parties, personnel, and proceedings, and (in the words of Alexander Hamilton) by the "pestilential breath of faction may poison the fountain of justice."[34]

(6) Because the media wield the power to make a person look foolish, narrow-minded, and biased, judges may be intimidated and unwilling to restrict the use of cameras even when necessary for justice.[35]

(7) The Supreme Court has repeatedly rejected the claim that the media have a constitutional right to use cameras in, make photographs in, or broadcast from federal courtrooms. "[T]here is no constitutional requirement that television be allowed in the courtroom."[36] As Chief Justice Warren declared in Estes, "On entering [the courtroom], where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present to observe the proceedings, and thereafter, if they choose, to report them."[37]

(8) The primary concern of the judge and court must be with matters of law, rights, due process and the fair administration of justice, whereas the primary concern of the media is with probing and displaying the social interests or entertainment value involved in the dispute; these judicial and media interests may be incompatible.[38]

Of course, other thoughtful judges and commentators have responded to these concerns.[39] The issue is certainly not one-sided.

I do not discount or minimize those concerns. However, those concerns go to the question of how to manage the use of cameras in the courtroom, how to exercise the discretion to allow cameras in the courtroom, and where and when to draw the boundaries on allowing cameras in the courtroom, not whether cameras should be permitted in the courtroom. The concerns of the judges who will have to deal with the issues surrounding use of cameras in the courtroom, particularly, should be listened to carefully, and I believe that S. 721 has taken seriously and respected those concerns. The bill only provides that judges presiding in particular cases have the discretion to allow or disallow the use of cameras in the courtroom, and leaves unhampered the discretion of the judge presiding in the case, who bears the responsibility for the quality of justice in the case.

S. 721 is very similar to Section 210 of H.R. 1752 (Federal Courts Improvement Act of 2000), which has passed the House of Representatives. It appears that there are two main differences between the two bills. First, subsection (b)(1) of the H.R. 1752 requires "the consent of all named parties" before a presiding federal judge can in his or her discretion permit the use of cameras, while S. 721 does not (instead, leaves it entirely to the presiding judge's discretion). I think that S. 721 is superior because mandatory deference to party wishes hamstrings the court and may interfere with the administration of justice; there is no need to defer to the wishes of

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[34] The Federalist Papers, No. 81 (Hamilton), *supra* at 484.

[35] *Westmoreland*, 752 F.2d at 33–34 (Winter, J., concurring). But federal judges are not spineless creatures!

[36] *Estes*, 381 U.S. at 587 (Harlan, J., concurring); *see* also Chandler v. Florida, 449 U.S. 560, 569 (1981); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) ("the guarantee of a public trial . . . confers no special benefit on the press"); *see further* Globe Newspaper v. Superior Court, 457 U.S. 596 (1982); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).

[37] Estes v. Texas, 381 U.S. 532, 585–86 (1965) (concurring opinion).

[38] *See generally* Estes v. Texas, 381 U.S. 587–91 (Harlan, J., concurring); Noisette, *supra* at 7–8 (Most of the interest of the media and public in watching trials on television is for entertainment, not education, and the more outrageous the trial the better entertainment it is.); Murphy, *supra* at 56–57 ("the press is governed by different rules"); Statement of Judge Harvey Schlesinger, Chairman, Committee on Magistrate Judges, Statement on Behalf of the Judicial Conference of the United States on the Federal Courts Improvement Act (H.R. 1752) <http://www.house.gov/judiciary/sch10616.htm> ("the paramount responsibility of a United States judges is to guarantee citizens a right to a fair and impartial trial"); Levenson, *supra* at 611 ("there must be a clear distinction made between the social practice as issue and the legal and factual issues that must be decided. Blurring the issues disserves the trial process and the importance of social debate."

[39] For example, the Second Circuit noted Judge Leval's perceptive explanation why cameras should be permitted in the federal courtroom in the *Westmoreland case:*

> 1. The experience of many states that live telecasting need not interfere with the fair and orderly administration of justice; 2. Other cases where exclusion of television might be necessary may be faced as they arise; 3. Telecasting does not offend the Constitution but perhaps infringes on the litigants' or public's rights to a public trial; 4. The public should see how the courts function, especially where the public interest is involved as it is here, where "it could even be reasonably argued that the filming of this trial is more important than its decision"; 5. It is in the interest of the federal judiciary to let the public see how hard it works and how fair it is; 6. It is a safe prediction that the eventual entry of the camera into the federal courtroom is inevitable.

Westmoreland, 752 F.2d at 17, n.3. *See also* Krygier, *supra* at 73–83,; Horth-Neubert, *supra* at 166–176.

a party when there is no good cause for the party's wishes.[40] Second, subsection (c) of S. 721 leaves to the presiding judge's discretion whether to refer to advisory guidelines that the Judicial Conference may promulgate concerning the use of cameras, while the House Bill requires the judge to refer to such guidelines "with respect to consistent criteria to be applied in the exercise of the discretion of the presiding judge . . . ." While both approaches are reasonable, requiring reference to such guidelines may insure that the judge will consider then, while it does not bind him to follow them, and may facilitate some consistency in the federal courts dealing with cameras-in-the-courtroom issues.

Finally, it appears to me that S. 721 does not infringe upon the separate authority of the Supreme Court. It does not seem intended to bind or restrict the Court in a way that would violate the Separation of Powers. It includes the Supreme Court in the precatory provisions, but those are permissive and discretionary, and it seems recognizes the independence of the Supreme Court. (The authority of Congress over the District Courts and Courts of Appeals is, of course, greater.)

Conclusion. I am a believer in and supporter of our federal judicial system. I believe that S. 721 will protect the federal courts and improve the administration of justice while serving the public interest in open judicial proceedings. It will benefit the courts, benefit the public, respect and enhance the discretion of the presiding judges to act in the best interests of justice, and will bring the federal courts into parity with the state courts in terms of accessibility to the public through cameras in the courtroom. I encourage this subcommittee to approve and recommend passage of S. 721.

Senator GRASSLEY. Thank you, Professor Wardle.

Now, Mr. Busiek.

STATEMENT OF DAVID BUSIEK

Mr. BUSIEK. Senator Grassley, Senator Schumer, distinguished members of the subcommittee, and guests, my name is Dave Busiek. I have served as News Director of KCCI–TV, the CBS affiliate in Des Moines, IA, for the past 12 years. Prior to that, I spent 12 years as a radio and television reporter and an anchor in Des Moines.

I am pleased today to testify regarding proposed legislation to allow media coverage of Federal court proceedings, not only on behalf of KCCI and the broadcast journalists of Iowa, but also on behalf of the Radio-Television News Directors Association, RTNDA, where I have served on the board of directors for 8 years. RTNDA is the world's largest professional organization devoted exclusively to representing electronic journalists.

First, I would like to thank the distinguished Chair of this subcommittee, Senator Grassley, for the invitation to be here today. For many of you, it probably seems that Senator Grassley has been around these halls for a long time. In fact, it has been 20 years since his election to the Senate. I know; I covered that campaign, and many before and since.

Coincidentally, that is precisely when Iowa began allowing cameras into its courtrooms. For us, it seems like forever. It has been 20 years. In fact, we have stopped counting how many cases have been covered by cameras, but I can tell you that not one judicial action has been overturned as a result of electronic coverage of Iowa's courts.

The presence of cameras in Iowa courtrooms is routine and well accepted. In his introductory note to our revised, expanded media coverage handbook in 1997, our then Chief Justice Arthur

[40] Perhaps a compromise would be to give judges discretion to disregard party wihses when there is in the court's opinion "no good cause" for disallowing the use of cameras, or when it would frustrate the administration of justice and the public interest to do so.

McGivern wrote, "By and large, the experience has been positive. I attribute this to the high caliber of Iowa's media and to carefully crafted rules. The goal of expanded media coverage is to increase public understanding of the court system."

I strongly believe that permitting television coverage of trials is simply the right thing to do, and I would like to point to two contrasting examples from Iowa that illustrate precisely why I hold this conviction.

The year 2000 opened in Iowa with news of a 2-year-old girl being found dead in her own bed, despite numerous warnings over the preceding months that there were signs of child abuse. Despite the warnings, nothing was done to remove that child from her abusive home. Ultimately, the girl's mother and her live-in boyfriend were charged with first-degree murder.

There were news crews from five different television markets covering the individual trials. Both defendants were acquitted of murder, although the mother was convicted of child endangerment. In short, we had a situation with lots of warning of abuse, but a dead child, two trials, and yet no convictions for murder.

Understandably, Iowans are upset, but they were also informed about precisely what transpired in the courtroom during those trials. They could see the difficult job prosecutors had trying to prove their case without any witnesses to the crime, and Iowans were able to form their own opinions about whether Human Services officials had done enough to protect this child.

I am convinced that better public policy will be made ultimately about how to prevent future cases of severe child abuse because Iowans were allowed to see for themselves and not through the filter of the few eyewitnesses in the crowded courtroom how difficult were the issues involved and how justice was dispensed. I would point to Senator Schumer's comments about the Diallo trial and fully support them as well.

The situation with coverage of Federal proceedings is quite different, however. I would like to cite another example from Iowa. In a 1997 crime spree, two local boys held up a bank in the town of Oskaloosa and killed two women in separate locations merely for the purpose of stealing their vehicles for getaway cars. These were senseless murders. The women did not offer any resistance.

People in the rural areas where these crimes occurred were stunned by the senseless violence. Many locked their doors for the first time. Others armed themselves with shotguns and went out looking for the suspects. For days, the entire area was on edge. After a massive manhunt, the suspects eventually were captured in Florida and returned to Iowa to stand trial on Federal bank robbery and murder charges. They decided to plead guilty.

The legal proceedings in this case were held in Federal court, in Des Moines, outside the view of television cameras. It occurred to me then, as it has in similar contexts, that the citizens were deprived of a chance to begin the healing process because they were unable to view these perpetrators making their confession statements to the court. Friends, relatives, fellow church members, and neighbors were not able to look into these suspects' eyes and judge for themselves what kind of a person would commit such a heinous

crime. It was an opportunity lost because of a needless ban on cameras in Federal courts.

The legislation proposed by Senators Grassley and Schumer represents an important step removing the cloak of secrecy surrounding our Federal judicial system, and there is no compelling reason not to support its passage. The First Amendment right of the public to attend trials has been upheld by the U.S. Supreme Court, and as the electronic media have become an increasingly important surrogate for the public in recent decades, that right logically must extend to audio-visual coverage of Federal judicial proceedings.

I should mention here that RTNDA believes that any law governing television coverage of the judicial branch should be ground in a presumption that such coverage will be allowed unless it can be demonstrated that it would have a unique adverse effect on the pursuit of justice or prejudice the rights of the parties in any particular case. Placing decisions as to whether or not to pull the plug on electronic coverage in the hands of the parties would violate the public's First Amendment right of court access.

In conclusion, I would like to say that in the same way that the public's right to know has been significantly enhanced by the presence of cameras in the House and then the Senate over the past two decades, the legislation proposed by Senators Grassley and Schumer has the potential to illuminate our Federal courtrooms, demystify an often intimidating legal system, and subject the Federal judicial process to an appropriate level of public scrutiny. It is time to provide unlimited seating to the workings of justice everywhere in the United States by permitting audio-visual coverage of judicial proceedings.

Thank you.

[The prepared statement of Mr. Busiek follows:]

PREPARED STATEMENT OF DAVID BUSIEK

Senator Grassley, Senator Schumer, distinguished members of the Subcommittee and guests: My name is Dave Busiek. I have served as news director of KCCI–TV, the CBS affiliate in Des Moines, Iowa, for the past 12 years. Prior to that, I spent 12 years as a radio and television reporter and anchor in Des Moines. I am pleased to testify today regarding proposed legislation to allow media coverage of federal court proceedings not only on behalf of KCCI and the broadcast journalists of Iowa, but also on behalf of the Radio-Television News Directors Association, where I have served on the Board of Directors for eight years. RTNDA is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives, educators, students and others in the radio, television, cable and online news business in more than 30 countries, and has long advocated opening our nation's courtrooms to the sunshine of audiovisual coverage. Our members are the people who have demonstrated that television and radio coverage works at the state and local levels, and they can make it work on the federal level.

First, I would like to thank the distinguished Chair of this subcommittee, Senator Grassley, for the invitation to be here today. For many of you, it probably seems that Senator Grassley has been around these halls forever. In fact, it's been 20 years since his election to the Senate. Coincidentally, that is precisely when Iowa began allowing cameras into its state courts. It's been 20 years! By now, we've stopped keeping count of how many proceedings have been covered because Iowa's laws allow electronic journalists to use the tools of their trade to inform the public about trials and other judicial proceedings. Certainly, several thousand cases have been covered and *not one* judicial action has been overturned as the result of electronic coverage of Iowa's courts.

The presence of cameras in Iowa courtrooms is routine and well-accepted. In his introductory note to our revised Expanded Media Coverage (or "EMC") handbook in 1997, then-Chief Justice Arthur McGivern wrote, "by and large, the experience has been positive. I attribute this to the high caliber of Iowa's media and to carefully crafted rules. . . . The goal of Expanded Media Coverage is to increase public understanding of the court system."

I strongly believe that permitting television coverage of trials is simply the right thing to do. I would like to offer today two contrasting examples from Iowa that illustrate precisely why I hold this conviction.

The year 2000 opened in Iowa with the news of a 2-year-old girl being found dead in her own bed, despite numerous warnings over the preceding months that there were signs of child abuse. Despite the warnings, nothing was done to remove the child from her abusive home. Ultimately, the girl's mother and her live-in boyfriend were charged with first-degree murder. In July, the boyfriend was tried in a small county seat town. There were news crews from 5 different TV markets covering the trial. The coverage went off without a hitch, despite this county having no prior experience with expanded media coverage. The boyfriend was acquitted of all charges. Earlier this month, the toddler's mother was also tried. She, too, was acquitted of murder, but convicted of child endangerment.

In short, we have a situation with lots of warning of abuse, a dead child, two trials, and yet no convictions for murder. Understandably, Iowans are upset. But, they are also informed about precisely what transpired in the courtroom during these trials. They watched as both suspects testified. They were able to form opinions about whether Human Services officials had done enough to protect the child. They could see the difficult job prosecutors had trying to prove their case without any witnesses. I'm convinced that better public policy will be made about how to prevent future cases of severe child abuse because Iowans were allowed to see for themselves, and not through the filters of the few eyewitnesses in the crowded courtroom, how difficult were the issues involved and how justice was dispensed.

Senator Schumer's home state offers a similar example. The recent trial concerning the death of Amadou Diallo in Albany, New York is illustrative of the important role television coverage can play. Justice Joseph Teresi's watershed ruling declaring a constitutional right to televise criminal trials opened the door to the type of pool coverage we often use in Iowa. The Diallo trial coverage also exemplifies how television can provide the public with a unique window on an important and controversial trial without compromising the integrity of the proceedings. By all accounts, there was no sign of the courtroom grandstanding that opponents of cameras in courts often cite. Any attempts by the prosecution and defense to speak to the public at large occurred outside the courtroom, as they would have with or without a camera inside. Most importantly, the public was allowed to witness first-hand the proceedings in this highly-charged trial and arrive at their own conclusions. Indeed, the decision to allow camera coverage of this trial probably averted more violent protests from those unhappy with the acquittal of the four police officers charged with killing Mr. Diallo, because, as a *New York Times* editorial pointed out, it "allowed the public to understand the legal complexities of the officers' claims of self-defense."

The situation with coverage of federal proceedings is quite different, however. I'd like to cite another example from my home state of Iowa. In a 1996 crime spree in Southern Iowa, two local boys held up a bank in Oskaloosa and killed two women in separate locations merely to steal their vehicles for get-away cars. These were senseless murders. The women did not resist. People in the rural areas where these crimes occured were stunned by the senseless violence. Many locked their doors for the first time. Others armed themselves with shotguns and went looking for the suspects. For days, the entire area was on edge. After a massive manhunt, the suspects were eventually captured in Florida and returned to Iowa to stand trial on federal bank robbery and murder charges. They decided to plead guilty.

The legal proceedings in this case were held in federal court in Des Moines, outside the view of television cameras. It occurred to me then, as it has in similar contexts, that the citizens were deprived of a chance to begin the healing process because they were unable to view these perpetrators making their confession statements to the court. Friends, relatives, fellow church-members, and neighbors were not able to look into the suspect's eyes and judge for themselves what kind of person would commit such a heinous crime. It was an opportunity lost because of a needless ban on cameras in federal courts.

As you know, under present law, television coverage of federal criminal and civil proceedings at both the trial and appellate level is effectively banned. Since the O.J. Simpson murder trial, many have been quick to point the finger at the camera as the cause of "sensationalism" and public distaste for our legal process. The empirical

evidence to the contrary is overwhelming—the camera shows what happens; it does not create it. The legislation proposed by Senators Grassley and Schumer represents an important step toward removing the cloak of secrecy surrounding our judicial system by giving federal judges at both the trial and appellate levels the discretion to allow cameras in their courts under a three-year pilot program. At its conclusion, Congress and federal judges would be given an opportunity to review the program. I believe that passage of this legislation will send a message to judges that giving the public access to courts through televised proceedings is a right and an opportunity, not an inconvenience.

There is no compelling reason not to support the passage of such legislation. The First Amendment right of the public to attend trials has been upheld by the U.S. Supreme Court and, as the electronic media have become an increasingly important surrogate for the public in recent decades, that right logically must extend to audio-visual coverage of federal judicial proceedings. I should mention here that TRNDA believes that state and federal law governing television coverage of the judicial branch should be grounded in a presumption that such coverage will be allowed unless it can be demonstrated that it would have a unique, adverse effect on the pursuit of justice or prejudice the rights of the parties in any particular case. Placing decisions as to whether or not to "pull the plug" on electronic coverage in the hands of the parties would violate the public's First Amendment right of court access.

Jurors, prosecutors, lawyers, witnesses and judges on both the state and federal levels have overwhelmingly reported for the last decade that the unobtrusive camera has not had an adverse impact on trials. The pilot cameras program conducted by six federal districts and the Second and Ninth Circuit Courts of Appeals between 1991 and 1993 was a resounding success, resulting in a recommendation that cameras be allowed in all federal courts. 48 of the 50 states allow some manner of audio-visual coverage of court proceedings, 43 allow such coverage at the trial level, and studies in 28 states show that television coverage of court proceedings has significant social and educational benefits.

Technological advances in recent decades have been extraordinary, and the potential for disruption to judicial proceedings has been minimized. The cameras available today are small, unobtrusive, and designed to operate without additional light. Moreover, the electronic media can be required to "pool" their coverage in order to limit the equipment and personnel present in the courtroom, further minimizing disruption.

There is no principled basis for admitting the print media into federal courtrooms and not the electronic media. While both print and electronic media fulfill the important role of acting as a surrogate for the public, only television has the ability to provide the public with a close visual and aural approximation of actually witnessing a trial without physical attendance. As Justice Stewart once observed, the Constitution requires sensitivity to the "critical role played by the press in America society . . . and to the special needs of the press in performing it effectively."

Indeed, video is our society's common language. Eliminating television coverage of federal judicial proceedings significantly impacts upon the content of the information conveyed about important trials, effectively resulting in content-based discrimination.

Because of the federal ban, the public has been deprived of the benefits of first-hand coverage not only at the district court level, but also at the appellate level. Consider only a few of the significant issues that have come before the federal Courts of Appeals in recent years—issues of great interest to the American public, yet ones that the public had no opportunity to see and hear:

- Whether a civil suit can be brought against the President of the United States while he is in office based on his private conduct.
- Whether there is a constitutional right to physician-suicide.
- Whether a state may under the First Amendment decree English to be its only official language.
- Whether a class action may proceed against the tobacco industry on behalf of tens of millions of smokers claiming to be addicted to cigarettes.
- Whether professional baseball owners may unilaterally rescind the free agency and salary arbitration rules governing their relations with players.

The public has a right to see how justice is carried out in our nation. Public scrutiny will help reform our legal system, dispel myth and rumors that spread as a result of ignorance, and strengthen the ties between citizens and their government. The courtroom camera not only gets the story right, it allows victims to have a record of the proceedings, and to reach a much broader audience. Experience shows that cameras in the courtroom work and that they do not interfere with courtroom proceedings or infringe on the rights of defendants or witnesses.

In the same way the public's right to know has been significantly enhanced by the presence of cameras in the House and then the Senate over the past two decades, the legislation proposed by Senators Grassley and Schumer has the potential to illuminate our federal courtrooms, demystify an often intimidating legal system, and subject the federal judicial process to an appropriate level of public scrutiny. It is time to provide unlimited seating to the workings of justice everywhere in the United States by permitting audio-visual coverage of judicial proceedings.

Thank you, Senator Grassley, for the opportunity to testify on behalf of RTNDA before your committee today.

Senator GRASSLEY. Thank you very much for your experience in that, and particularly the good record we have had in Iowa on its use.

Now, Mr. Goldfarb.

STATEMENT OF RONALD GOLDFARB

Mr. GOLDFARB. Thank you, Senator Grassley, Senator Schumer. One of the benefits of speaking last is I can speak a little more briefly and I have the benefit of picking up on some of the comments of the members of the subcommittee and the earlier speakers.

In 200 years of Anglo-American law, we have debated the profound issues, first, of the problems of in camera proceedings, and now several years later the problems or benefits of on-camera proceedings. It is a particular subject that raises profound constitutional and social implications, and it happens to be one that I have studied for a long time.

My doctorate degree when I went to Yale Law School was on the doctrine of constructive contempt, and I read all of the cases at that point, ages ago, which dealt with the power of courts to find the print press guilty of contempt for their coverage of court proceedings on the grounds that it interfered with the administration of justice. The subject was one that continued to interest me both as a trial lawyer in the Government and later after I left the Government.

In the early 1960's, the members of the subcommittee will remember the then so-called free press/fair trial became a major issue. The Supreme Court had handled the Shepard case and the Bill Sol Estes case, which for the first time dealt with television in courts. The Riordan committee studied the role of the press and the bar. Committees were set up all over the country to worry about this problem.

The 20th Century Fund in New York, now the Century Fund, retained Alfred Friendly, who was the Managing Editor of the Washington Post, and me to write a book about the free press/fair trial problem. That was in the mid-1960's, and television was so new even then that we had only the barest mention in a chapter called "The Pen and the Lens" raising the question of whether or not the rules should be different for the broadcast media than it is for the print medium.

In that interim from then until the present time, as you know, the Supreme Court in 1981, in the Chandler case, ruled that television per se did not interfere with the constitutionality of a fair trial, and left it to the States to fashion their own rules. It was, in the words of Justice Harlan, the genius of the Federal system

to experiment with rules like this to see what does and does not work.

Several years ago, the 20th Century Fund came back to me and said now, with the experience that we have now had with the crucible of Court TV, which then had had about 600 to 700 cases televised, with the experience of then 48 States and all of the different studies, let's look at the problem again, and that resulted in this book *TV or Not TV,* which was published by the 20th Century Fund and NYU Press.

In the process of my research, I read every State study that led to every State rule that resulted in permission for one form or another of televised trial. Every State before they adopted their rule had a press-bar-media-wiseman/wise woman committee that ran for from a year to 3 years to study all of the perceived problems of the impact or potential impact of television on witnesses, on jurors, on lawyers, and all the participants to the administration of justice.

And in every one of those studies, the result was once skeptical lawyers and judges found that the presence of the television camera, generally unseen, had no impact, and that the real disturbances in the justice system were what went on outside the courtroom as opposed to what went on in the courtroom.

I brought two pictures which graphically make this study which I can—they are blow-ups of photographs that I have used in my book. Two of them are pictures outside of the O.J. Simpson case, one the criminal case, and one the civil case, where the kind of grotesque paparazzi coverage of people coming out of the courtroom creates the image that people are so concerned about with regard to press coverage of trials.

But one of them shows an actual proceeding of the Supreme Court of Washington, which is now the only State which televises all of its supreme court arguments. And there you will see a totally dignified atmosphere which, according to the Justices of the Washington Supreme Court, typifies the way those proceedings in that court have been run.

It comes to the question of whether or not there is a valid distinction between the print medium and the broadcast medium. In the early days of the Sol Estes case, the concern was that there would be wires snaking across courtrooms and cumbersome television cameras getting in the way and inhibiting witnesses. Of course, we now know that the new technology is such that those kinds of concerns are well beyond us. The State Trial Association down in Williamsburg has put out a study that shows all of the high-tech conveniences that are now built into all new courtrooms that are being designed.

So then the question remains, well, if we don't have physical obstructions, what about the impact? What about the concerns that Judge Becker raised before? All I can say is I read that Federal study that he referred to. I read the report of its own in-house committee which recommended that the State rules be emulated. The Judicial Conference didn't like the results of the first study. They sent them back to do some more studies and to answer some more questions, and their own advisory committee, their own think tank,

if you will, came back recommending that the State rules be followed in the Federal system as well.

So what basis do we have for presuming in this one situation that people who are being perceived widely are going to misbehave in a worse fashion than when they are acting privately? It goes against everything that we operate under in every other aspect of life. We presume that people behave better when they are being observed than when they are not being observed.

But in this one context, somehow or other some judges have drawn the conclusion to be able to stop televising Federal trials on the notion that somehow or other the mere knowledge that a camera is there is going to have everybody acting out in a way that just belies all of the studies that have been done.

In addition to the studies by the States and the Federal Judicial Center, I went to the Lexis-Nexis machinery and found every study that had ever been made by sociologists, pollsters, and other social scientists to try and determine scientifically, such as you can under these circumstances, whether there really is something to be said for the fact that the presence of an unseen eye would somehow or other disrupt the participants.

Every one of those studies, as well, indicated that what might have seemed to be rationale conclusions really had no basis. The general consensus even by skeptics was after a while the camera was like a piece of furniture in the room, and after 30 or 40 seconds one failed to even notice it.

I would like to come to just one last point that was raised by Senator Specter because it is a particular passion of mine. Because I am an attorney who is a member of the Supreme Court bar and happen to live in Washington, DC, for the 35 years that I have practiced in this city I have had the extraordinary good fortune of being able to go to our Supreme Court whenever there was a case that interested me.

And it has been a highlight of my education to say that I heard the Bakke case argued, I heard the right to die case argued. I watched Justice Harlan deliver his *Griswold* opinion. And it seems to me absurd that that is limited to those few of us who by chance happen to be here. All of the arguments that anybody has made about televised proceedings go out the window with regard to the Supreme Court. Yet, it has been the Supreme Court which has been the most adamant opponents to the process.

Interestingly, when Justice Burger was the Chief Justice on the Court, he was vehemently against cameras in the Court. When he left the Supreme Court, in a speech at the ASNE he said he had changed his mind and now saw that there was an edifying possibility.

When Justice Rehnquist came up for confirmation as Chief Justice, he was asked specifically what his position would be if he were Chief Justice and he said he had an open mind to broadcasting proceedings of the Supreme Court. Yet, when he took that role as Chief Justice, he not only forbade radio broadcasting of arguments before the Supreme Court, but threatened a lawsuit to somebody who printed the oral arguments which are present in the archives of some key cases that have been argued in the Supreme Court.

So I heartily endorse that part of your bill which reaches out to the Supreme Court. I mean, one can envision a kind of quintessential separation of powers conflict if the Supreme Court were to say we will decide. But in view of its own opinions to date and in the last decade about questions of First Amendment in the Court, it is going to be very hard for them to do that.

[The prepared statement of Mr. Goldfarb follows:]

PREPARED STATEMENT OF RONALD GOLDFARB

Thank you for the opportunity to address the Sub-committee on S. 721, a proposed bill to permit televising trials and appeals in the federal courts in the discretion of the presiding judge during a three-year experimental period. It is similar to the bill passed by the House recently, except that that bill requires the consent of the parties. In my opinion, however salutary, neither bill goes far enough, for reasons I will explain.

As this committee knows, since the Supreme Court's opinion in Chandler in 1981, the states, all but one now, have studied the subject of televised trials and concluded that the positive and educational aspects of public information outweigh any potential negative impact on the fairness of the judicial process. In state after state, initial concerns about lawyers and judges misbehaving, witnesses and juries being negatively affected were assuaged, even by once skeptical observers and experts. The federal system conducted its own three-year study in 1991, concluding that fears about television in courts were misplaced. The Judicial Conference Committee researchers recommended following the state rule. Despite almost a quarter century of study and experience with this one medium, with very few exceptions (see pages 88–94 of my book) the federal court system remained reluctant to move into the 20th century, much less the 21st.

S. 721 would move the federal court system a modest step into the mainstream. I believe it is time to make the full plunge. I would not allow witnesses to control the judge's discretion, except in extraordinary cases where the youth or personal nature of the testimony requires special controls—and in those cases I would leave it to the judge to make that decision. I believe that recent federal law, spelled out in a list of Supreme Court Cases (see pp. 47–54 of my book), makes it clear that the First Amendment requires opening trials to television unless without closure there would be "a substantial probability that irreparable damage to the defendant's fair trial right will result." The one seeking closure must show that less drastic alternatives to closure will not adequately protect the fairness of the trial, and that closure will effectively protect the defendant from the perceived harm. In other words, the presumption in all cases should be that trial and appellate procedures are open, and those wishing to curtail television coverage of any proceedings have the burden of demonstrating clear reasons why that should be the case.

Finally, I commend the Committee for focusing on the most interesting aspect of this issue—televising the open proceedings of the Supreme Court, which is explicitly allowed by S. 721. Here, more than any other situation, the profound educational aspect of public information about the Judicial process and about fundamental social issues eclipses the insignificant potential problems. There are no witnesses and no juries to be concerned about. The judicial members and legal advocates are the most renowned, as a rule, and thus least likely to be affected by the presence of an unseen camera and audience. And the need for the public to know about the treatment of the country's most significant issues considered in the one crucible of government which is least understood is manifest. The late appellate judge Skelly Wright called the operations of the Supreme Court a "continuing constitutional convention," and I agree with him that the American public and the legal system would profit from observation of those proceedings.

Senator GRASSLEY. I will defer to Senator Schumer because he has to go.

Senator SCHUMER. Well, I thank you, Mr. Chairman. I want to thank all three witnesses for their statements. I just had one ques-

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Ronald Goldfarb is a Washington, DC attorney and author. He was a prosecutor and defense counsel in the United States Air Force, and a member of the organized crime section of the Department of Justice during the Kennedy Administration. He has written ten books, including his most recent, *TV or not TV: Television, Justice, and the Courts,* a Twentieth Century Fund Book published in 1998.

tion not quite on this subject, because I agree with the witnesses and I think they have done excellent testimony. My question is somewhat related. I will beg the indulgence of the Chair.

I wanted to ask Mr. Busiek your opinion. There is something else that has been going on here that may hurt us a little bit, and that is Court TV is supposedly going to offer a new program called "Confessions," where each episode will present the highlight of confessions of convicted murderers and rapists and other violent criminals. The network will split the screen and show reenactments of the crime along with each confessor.

As a well-experienced and judicious person from the television side, what do you think of this? Do you think that it undermines the sorts of programs and arguments of Court TV and other networks who claim to want to show trials for public interest as opposed to finding the most sensationalistic coverage and shooting for the highest ratings? Also, is such a show fair to the victims of crime and their privacy?

My view is that Court TV is harming its own reputation for serious, full coverage for the sake of ratings on a show that seems more like Jerry Springer. Do you have an opinion on that?

Mr. BUSIEK. Well, I only heard of this program earlier today, so I don't know that much about it, but that has never stopped me before. Would this be before a trial or, for instance, after a guilty plea that these tapes would be shown? I don't know. I think it would make a big difference.

Senator SCHUMER. People who have been convicted.

Mr. BUSIEK. People who have been convicted. I don't see any harm in it. I mean, I think the case is done. I think it is a completely separate thing than what we are talking about today. I am sure that Court TV has done and will continue to do things that you or I may agree with or may not agree with.

I think the overriding good in terms of what they have been able to do in terms of shining that light into our court system is good. They are a business like a lot of media companies are a business, so it is not necessarily a bad thing just to do a popular program that might be getting ratings. So, that is part of it.

But I think if a case has already been adjudicated and these tapes are played, I personally—again, speaking from not a lot of knowledge on it, I would not have a problem with that.

Senator SCHUMER. Does anyone else want to comment on it? I find there is something wrong with it.

Mr. GOLDFARB. Well, I think so, but when you talk about reenactments, E! TV is doing that already, and it seems to me that is a different kind of question. That is a question of taste. The ultimate answer, I think, is gavel-to-gavel coverage.

Senator SCHUMER. Right.

Mr. GOLDFARB. It is the answer to the 50-second sound bite. It is the answer to the "snippets," but that is what we get now by the print medium. In my book, I report Leslie Maitland, who is a very illustrious reporter for the New York Times who covered the Hurricane Carter, grieving about the fact that she would be there all day watching proceedings that she was very critical of and was limited to 800 words. That is the classic snippet, as is the 50-second sound bite that Judge Becker was talking about.

I don't know that you can keep people from doing that, but they would be seen to be the distortions that they are if you had gavel-to-gavel coverage. C–SPAN has offered to do it, to have no advertisements. MSNBC, I think, has offered to put it on the radio, again, with no advertisements and to do gavel-to-gavel coverage.

Senator SCHUMER. Yes, I agree with you and with Mr. Busiek that this is a question of taste as opposed to a question of legality. I just think it is in bad taste. And I hope it doesn't interfere with our desire to get cameras in the courtroom, and I would like to make a distinction between the one and the other. I agree with you. The best antidote to that would be to have the whole trial shown.

Thank you, Mr. Chairman. Again, I thank the witnesses.

Senator GRASSLEY. On the point you just brought up, I think the extent to which it adds to the violence that we already have enough of on television, and the sex that we already have on television and all things of that nature, and how that leads particularly younger people to be immune to thinking about the results of their acts, it leads to a general lack of civility in society as a whole.

You know, I think we have to start judging what the impact is upon society that causes people to be violent toward each other without a second thought. Now, there are a lot of people that are violent toward each other with thought of being violent. But too much we are hit today with people just acting out of instinct and what that has done to a lot of aspects of our society, not just that people are hurt and killed, but a lack of respect for each other, or maybe another way to put it is respect for each other, is the very basis for a civil society.

Senator SCHUMER. Well put, Mr. Chairman.

Senator GRASSLEY. I just have two or three questions. The first one builds upon something Mr. Busiek has mentioned, and these were some compelling cases where cameras played an important role and a Federal case where there were not cameras and the impact that that had.

In the 20 years of experience in State courts, do any of you have any examples where cameras caused any of the problems that the Judicial Conference says would take place, like terrorist attacks or denying defendants fair trials? And I will ask all three of you, including Mr. Busiek if he knows of any, or Professor Wardle, or from your standpoint of your research, Mr. Goldfarb.

Mr. WARDLE. Mr. Chairman, I am not aware of any studies or cases in which there has been the terrorist problem. On the other hand, we are all aware of examples in which presence of media has had a disruptive effect on trials. The point is that the bill allows the judge the discretion to put on conditions to prohibit those events from occurring, or, if they occur, ban the cameras.

Frankly, Your Honor—excuse me, Senator.

Senator GRASSLEY. It sounds better. [Laughter.]

Mr. WARDLE. It sounds better. Well, you are both Honorable Senator and Chairman.

In fact, there are violent episodes that occur in courts, for instance, with respect to divorce, child custody, child support. Not a day goes by that you can't read in a newspaper about someone who has gotten angry and done some violent thing in connection with

those. Those occur, by the way, mostly in State courts where these proceedings are allowed.

The point is that there are methods by which they can protect and prevent that. They simply say this proceeding is not going to be broadcast to exacerbate the feelings, the animosity, or the situation. I am not aware of any terrorist examples at all.

Senator GRASSLEY. Mr. Busiek and then Mr. Goldfarb.

Mr. BUSIEK. I am not aware of any of these problems. I think it is important to point out that in Iowa, as is the case in a lot of States, the onus is on the media to make this thing work. That is the one thing we can cooperate on. I mean, reporters are famous for not cooperating with one another. They are sort of an unruly sort, but on this all the newspapers, the radio stations, cooperate to make this thing work.

There are 13 media coordinators spread regionally around the State, and those are reporters, people in newsrooms, and they work with the other folks in those newsrooms to make sure that this is a coordinated effort and that you don't have a bunch of people running to the judge to work things out.

We get our issues on the table. The media coordinator goes to the judge and we try to work problems out before they occur. The judges in Iowa have been extraordinarily supportive. We had a banquet a couple of years ago with judges and media and lawyers to actually celebrate the EMC program in Iowa. I think it has brought the media and the judiciary closer together. I don't know if that is a good thing or a bad thing. I would like to think that it is a good thing.

Senator GRASSLEY. Mr. Goldfarb.

Mr. GOLDFARB. In my experiences in courtrooms, I have not had the kind of problem that has concerned Judge Becker. The problems that I have noted are the problems in the picture that I showed you, which is the press hanging around outside of people's homes, sticking cameras in their faces, running alongside their cars, adding those kinds of pressures. Those are out-of-court problems, but I have never seen that in the court.

In fact, the few unpleasant experiences that I can recall in courtrooms of judges, I think, acting, shall we say, with eccentricities probably would never have occurred if there was a camera in that courtroom, but only happened because they ran those courts and those particular cases as little oligarchies. I think the presence of the public in those situations would have been salutary.

Senator GRASSLEY. I am going to ask Mr. Busiek and then the other two of you to comment on the same point that I am making and asking his opinion. Judge Becker pointed out that people's privacy rights would be compromised if we allowed cameras in the courtrooms. You probably deal with this issue everyday. This is what Judge Becker said, "Much of the evidence introduced may be of an extremely private nature, revealing family relationships and personal facts, including medical and financial information."

What practices and procedures exist in the States that protect privacy rights? Maybe you can just speak for Iowa, but either case.

Mr. BUSIEK. Well, these issues do come up from time to time. Lawyers have the ability to object in the middle of a trial about a certain witness' face being shown on television, about certain testi-

mony if it is of a sensitive nature. It can often be of a sexual abuse kind of nature. And I think the media in Iowa have a terrific track record of cooperating and trying to work to make that happen. We want to make sure that our rights aren't being abused, as well, but we talk about in chambers and we try and work those things out.

In response to Judge Becker's comments, I would say that a trial is a public event. Things are going to be said in public that may well be embarrassing to the people taking part in it, but I think every one of the potential objections that he raised could also be caused by print coverage, as Senator Schumer pointed out.

I haven't heard that anyone has asked questions of a witness or judges or lawyers if they were at all affected in any way by the presence of a newspaper reporter in the courtroom. My guess is that some would be. You know, we can have a very orderly process by just closing everything off. But this is sometimes a messy process and I just tell you that the presence of a camera in the courtroom does not add to any problems that are already inherent in having a public trial.

Senator GRASSLEY. Professor Wardle.

Mr. WARDLE. I would agree with that, Mr. Chairman. I believe that there are important issues. And I think Judge Becker's statement is a very thoughtful statement, but it doesn't go to the question that is addressed by this bill. The question addressed by this bill is should judges have the discretion to allow cameras in the courtroom. The objections go to the question of, if so, how, when, under what circumstances, where are the boundaries to be drawn, what limits.

And one of those concerns is to protect privacy of individuals. Yes, you can establish guidelines and rules on certain kinds of cases or certain kinds of issues. Or when there is a witness who is particularly distraught, you might, in fact, say we won't allow cameras here because this witness is extraordinarily sensitive, or it is a child.

So, yes, there are very valid concerns, but the bill protects the discretion of the judges to deal with those concerns, as judges are capable of doing. Our Federal judges are not spineless creatures. They know how to exercise discretion to protect the fairness of the administration of justice and the decorum of a courtroom. I have no doubt that they will be able to do that under this bill.

Senator GRASSLEY. Mr. Goldfarb, if you have anything to add.

Mr. GOLDFARB. No, just that the different State rules are not unlike the one in Iowa. Almost all of them have a provision which allows the judge in cases where you have a witness of tender age or a sexual crime or unusual elements that don't generally prevail—a witness whose life might be threatened, extraordinary situations like that—for the judge to make exceptions to the general rule, which is that despite the fact that there might be more publicity, I mean the question is whether or not there is enough difference in degree to make it a difference in kind.

And you can't sidestep the question that if you know—if we today knew that our testimony was going to be broadcast to hundreds of millions of people all over the world, I suppose my anxiety level would be a little bit higher. I don't think I would be acting

out or trying to play the fool, but I am sure it would have some impact on me.

But experience seems to indicate that that is, number one, something that can be kept in balance and that evaporates over time, and more importantly that the issues discussed at this proceeding, if they are of interest worldwide, ought to be heard and considered worldwide. That is an overriding interest of public information.

Senator GRASSLEY. Let's go to another issue that Judge Becker argued about, and that is that the financial costs would be very great if cameras were allowed. So the question is has that been a problem that has come up in the State experience, whatever thoughts you might have on that issue from each of you on the panel?

I will start with you, Mr. Busiek.

Mr. BUSIEK. I am not aware of any costs in the State system at all. I heard him mention media coordinators. As I have already testified, in Iowa that is handled by the media themselves, not by the courts. I am not aware of any costs whatsoever.

As courtrooms are remodeled, I think it is up to any jurisdiction to decide whether they want to put in some cabling for the future. We have been consulted on that at the Polk County Courthouse in Des Moines. We have assisted with that, we have helped pay for some of that. I am not aware that there is any significant cost.

Senator GRASSLEY. Professor Wardle.

Mr. WARDLE. I believe that there are costs, Mr. Chairman. In reality, the judge will have to consider this. The question will be raised. The parties may, in fact, submit briefs or make motions. So there are the indirect costs, but it is another issue that can come up. But they are not substantial.

Senator GRASSLEY. In that instance, though, it would be if there was going to be a dispute if there be cameras in the courtroom.

Mr. WARDLE. Right, if someone objects.

Senator GRASSLEY. If there wasn't any dispute, there wouldn't be a cost, right?

Mr. WARDLE. That is right. There wouldn't be a cost, except the minor cost that the judge would independently think about it for 2 minutes or 10 minutes, or whatever. But those are insignificant and unsubstantial. They are very real, and there could be equipment costs down the road, but that is, I think, normal and not extraordinary. I think it is well within what we expect as the courts continue to cope with changing circumstances.

We now have electric lighting in courts, a cost that we didn't have when the Constitution was written and Article III was created. So, yes, there are minor costs, but I don't believe they are substantial, except in the rare case. So I think it is an insignificant point.

Senator GRASSLEY. Does your research say anything on that, Mr. Goldfarb?

Mr. GOLDFARB. I would have to disagree, and the committee should take note of the fact that the Judicial Conference went to the people who conducted its study after they came up with their results and asked them what the costs would be to equip Federal courts with the equipment necessary to televise trials per their rec-

ommendation. And they came back with a figure of $70,000 to $130,000, I think, if I have the numbers correctly, per courtroom.

You all in Congress have the power of the purse. If you——

Senator GRASSLEY. That sounds a little ridiculous, though, doesn't it?

Mr. GOLDFARB. Well, that sounds like it would be very high.

Senator GRASSLEY. Well, I mean it is a ridiculous figure just on the surface. I haven't studied their rationale for it, but you are reporting that is what they—

Mr. GOLDFARB. That is what the Judicial Conference study group advised the Judicial Conference.

If you did the ideal, which is what the State of Washington, for example, did in its supreme court where they have no cameras—there is just a little hole in the corner of the room, fiber optic connections to a privately-funded cable network that is three blocks and that televises all State proceedings. That is all done with foundation money and some State legislative money.

But Congress has the power of the purse, I needn't tell you, and to the extent that you feel there is an overriding public information value to this, it is something you can take care of. But I wouldn't ignore it and I wouldn't say that it is de minimis.

Mr. BUSIEK. Might I just add that these two murder trials with the child abuse case were in courtrooms that had never had televised coverage before, both cases handled by judges who had never handled an expanded media case before. It is our equipment. We came in, set the stuff up. There was no cost to that courthouse system whatsoever and it worked just fine. So I am not understanding what could cost that kind of money. I am not saying that they didn't report it.

Mr. GOLDFARB. Well, I mean it is a policy question. Does the Federal judicial system want to have a contract with ABC or CBS or a pool of reporters to come in and, in effect, provide television coverage? I hadn't heard that suggested even by the networks. Case by case, individual stations may decide it is a worthwhile investment, but when you are talking generically and systemically—again, I am not saying it is a reason for not doing it, but I am saying it is a legitimate question, it is a legitimate problem. Congress is going to have to deal with it.

If, in fact, a rule was passed saying that from now on all Federal courts are going to be televised, then the next question is, well, who is going to pay for the camera. And in era where this Government is quite concerned with what we do with our surplus, whether there is a surplus, what the priorities are, I would say this is probably a relatively low priority in the grab bag of what is going to happen with Federal funds.

Senator GRASSLEY. My last question will be to Professor Wardle, and this is something Judge Becker made a point of that the primary concern of Federal judges is to make sure that defendants receive a fair trial. It seems to me that there are a number of other constitutional rights that a judge needs to be concerned about.

So would you agree that there are other important rights and issues that a Federal court needs to be looking at, in addition to the rights of the defendant?

Mr. WARDLE. Yes, Senator Grassley, I would. I would also agree with Judge Becker that in a criminal case the predominant concern is fairness to see that justice is done, a fair trial is received by the defendant. But there are other concerns, as well. The Sixth Amendment is a multi-faceted amendment and there are other rights, as well, that have to be protected—Fourth Amendment rights, First Amendment rights, as well.

So, yes, I agree that there have to be other constitutional and important public considerations taken into account. Judges don't just have one rule that they have to apply. The Constitution is a much more textured and complete document than that. So I think it is a bit of an oversimplification to say that that is the only consideration. Yes, there are many other constitutional and legal factors that courts have to consider. Speedy trial they are required to consider, which sometimes is in tension with the right to a fair trial. So, yes, there are a lot of factors that have to be considered.

Senator GRASSLEY. That is the last of my questions, and I suggested to the first panel and suggest to you that there not necessarily will be, but there may be some questions submitted for answer in writing. We would appreciate it very much if you would have those answered in two weeks. In the case of any of you who haven't dealt with that process, my staff would be helpful to you in that process.

Thank you very much.

[Whereupon, at 4:07 p.m., the subcommittee was adjourned.]

APPENDIX

PROPOSED LEGISLATION

II

106TH CONGRESS
1ST SESSION

S. 721

To allow media coverage of court proceedings.

IN THE SENATE OF THE UNITED STATES

MARCH 25, 1999

Mr. GRASSLEY (for himself, Mr. SCHUMER, Mr. LEAHY, Mr. FEINGOLD, and Mr. MOYNIHAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To allow media coverage of court proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AUTHORITY OF PRESIDING JUDGE TO ALLOW MEDIA COVERAGE OF COURT PROCEEDINGS.

(a) AUTHORITY OF APPELLATE COURTS.—Notwithstanding any other provision of law, the presiding judge of an appellate court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides.

(b) AUTHORITY OF DISTRICT COURTS.—

(1) IN GENERAL.—Notwithstanding any other provision of law, any presiding judge of a district court of the United States may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides.

(2) OBSCURING OF WITNESSES.—(A) Upon the request of any witness in a trial proceeding other than a party, the court shall order the face and voice of the witness to be disguised or otherwise obscured in such manner as to render the witness unrecognizable to the broadcast audience of the trial proceeding.

(B) The presiding judge in a trial proceeding shall inform each witness who is not a party that the witness has the right to request that his or her image and voice be obscured during the witness' testimony.

(c) ADVISORY GUIDELINES.—The Judicial Conference of the United States is authorized to promulgate advisory guidelines to which a presiding judge, in his or her discretion, may refer in making decisions with respect to the management and administration of photographing, recording, broadcasting, or televising described in subsections (a) and (b).

SEC. 2. DEFINITIONS.

As used in this Act:

(1) PRESIDING JUDGE.—The term "presiding judge" means the judge presiding over the court proceeding concerned. In proceedings in which more than one judge participates, the presiding judge shall be the senior active judge so participating or, in the case of a circuit court of appeals, the senior active circuit judge so participating, except that—

(A) in en banc sittings of any United States circuit court of appeals, the presiding judge shall be the chief judge of the circuit whenever the chief judge participates; and

(B) in en banc sittings of the Supreme Court of the United States, the presiding judge shall be the Chief Justice whenever the Chief Justice participates.

(2) APPELLATE COURT OF THE UNITED STATES.—The term "appellate court of the United States" means any United States circuit court of appeals and the Supreme Court of the United States.

SEC. 3. SUNSET.

The authority under section (1)(b) shall terminate on the date that is 3 years after the date of the enactment of this Act.

O

ADDITIONAL SUBMISSIONS FOR THE RECORD

ADMINISTRATIVE OFFICE OF THE U.S. COURTS

JUDICIAL CONFERENCE OPPOSES BILL TO BRING CAMERAS INTO FEDERAL COURTS

A representative of the Judicial Conference of the United States today told the Senate Judiciary Subcommittee on Administrative Oversight and the Courts that a bill to allow cameras in courtrooms could "seriously jeopardize" the rights of citizens to receive a constitutionally guaranteed right to a fair trial.

Chief Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit appeared before the subcommittee to express the Judiciary's strong opposition to cameras in the courtroom. The bill, S. 721, would allow media coverage of court proceedings.

"The Judicial Conference in its role as the policy-making body for the federal judiciary has consistently expressed the view that camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial. We believe that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process," said Judge Becker. "Moreover, in civil cases cameras can intimidate civil defendants who, regardless of the merits of their case, might prefer to settle rather than risk damaging accusations in a televised trial."

A Federal Judicial Center study of a three-year Judicial Conference pilot program allowing electronic media coverage of civil proceedings in six district and two appellate courts, found that 64 percent of the participating judges reported that, at least to some extent, cameras make witnesses more nervous than that otherwise would be. In addition 46 percent of the judges believed that, at least two some extent, cameras make witnesses to appear in court, and 41 percent found that, at least to some extent, cameras distract witnesses.

Judge Becker also pointed out that as an educational tool for the public, the Judiciary's own community outreach efforts have been demonstratively more effective than proposed camera coverage in presenting basic educational information about the legal system. A Federal Judicial Center report on media coverage during the three-year pilot project concluded that of 90 stories analyzed, there was an average of 56 seconds of courtroom footage per story and most of the footage was voiced over by a reporter's narration. Seventy-seven percent failed to identify the type of proceeding involved. "Television news coverage appears simply to use the courtroom for a backdrop or a visual image for the news story which, like most stories on television," said Judge Becker, "are delivered in short sound bites and not in-depth."

The Judiciary has repeatedly examined the issue for over six decades. Criminal rules adopted in 1946 included a prohibition on electronic media coverage of criminal proceedings. In 1972, the Judicial Conference adopted a prohibition against "broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto . . ." that applied to criminal and civil cases. In 1988 the Conference revisited the issue and recommended the Judiciary begin a three-year pilot program allowing electronic media coverage of civil proceedings in six district and two appellate courts. A 1994 study of the pilot project by the Federal Judicial Center convinced the Judicial Conference and the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern. In 1996 the Conference again considered the issue and voted to strongly urge each circuit judicial council to adopt an order not to permit the taking of photographs or radio and television coverage of proceedings in district courts. The Conference left it up the appellate courts whether or not they would adopt similar rules, and all but two courts of appeals subsequently adopted prohibitions.

"This is not a debate about whether judges would be discomfited with camera coverage," Judge Becker told the subcommittee. "Nor is it a debate about whether the federal courts are afraid of public scrutiny. They are not. . . . It is also not about increasing the educational opportunities for the public to learn about the federal courts or the litigation process. . . . Rather this is a decision about how individual Americans, whether they are plaintiffs, defendants, witnesses, or jurors, are treated by the federal judicial process. It is the fundamental duty of the federal Judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. The Judicial Conference believes that the use of cameras in the courtroom could seriously jeopardize that right. It is the concern that causes the Judicial Conference of the United States to oppose enactment of S. 721."

AMERICAN BAR ASSOCIATION,
GOVERNMENTAL AFFAIRS OFFICE,
Washington, DC, September 25, 2000.

Hon. CHARLES E. GRASSLEY,
Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: We are writing to commend you for holding a hearing September 6, 2000, on the issue of "cameras in the courtroom." We would appreciate your including this letter in the hearing record.

The Association has had a long and cautious history with respect to broadcast coverage of federal judicial proceedings. In 1937, the Association formulated its original ban on camera coverage as Canon 35 of the then Canons of Judicial Ethics because of concerns about preserving the dignity and decorum of the courtroom, safeguarding the right to a fair trial in criminal proceedings, and avoiding the possible adverse impact on the fact finding process and the administration of justice.

During the 1970s, many state courts started to permit camera coverage, generally with favorable results. After observing such successful experimentation in the states, and following the 1981 unanimous decision in *Chandler v. Florida,* 449 U.S. 560, holding that due process does not require an absolute ban on cameras in the courts, the Association revised its policy to authorize the presiding judge to permit broadcast coverage of criminal proceedings consistent with the right to a fair trial and subject to express guidelines.

In 1989 an ABA Task Force on Outreach to the Public recommended televised coverage of oral arguments in the United States Supreme Court, based on the belief that it would generate increased understanding and respect for our judicial system. The House of Delegates, our policy-making body never considered this recommendation, and it therefore does not constitute official ABA policy.

In 1991, the Judicial Conference of the United States began a three-year pilot program to broaden coverage of selected civil court proceedings. The Association wholeheartedly endorsed this action. At the conclusion of the pilot program, the Judicial Conference voted to terminate all electronic coverage of courtroom proceedings, despite a favorable evaluation by the Federal Judicial Center. Many ABA members felt that the debate over electronic coverage should not be closed and that the evidence supported the conclusion that such coverage is not detrimental to the administration of justice. After careful review of these developments, the Association adopted policy in 1995 urging the Judicial Conference to authorize further experimentation with electronic media coverage.

Today, five years later, the Association reiterates its position, which, if anything, is strengthened by mounting evidence of the benefits derived from expanded medial coverage of courtroom proceedings.

Results from a recent study commissioned by the Association to assess public perception of the U.S. justice system demonstrate in stark terms why public access to our federal courts is so desirable. Forty-seven percent of those polled felt that the courts do not treat all racial and ethnic groups the same. We are concerned that such widespread public perception of bias will erode public confidence in our courts. The study also disclosed that the public's knowledge of the justice system is quite uneven and, for a great many, insufficient; however, more than two-thirds of the respondents want to improve their knowledge. This is very good news because the study also found that the more knowledge people have about the justice system, the greater their confidence and respect for the system. Bringing the public inside the courtrooms of America so that they can learn from what goes on there can only be accomplished on a broad scale through electronic media coverage.

Allowing federal judges to decide, on a case-by-case basis, whether to allow electronic media coverage of court proceedings under guidelines promulgated by the Judicial Conference will be good for the courts and good for the public. Courts that conduct their business openly and under public scrutiny protect the integrity of the federal judicial system by guaranteeing accountability to the people they serve. Court proceedings that are accessible and visible benefit the public because of the invaluable civic education that results when citizens witness federal courts in action.

We share your conviction that the debate over electronic media coverage of federal court proceedings is not over and that additional experimentation should be permitted, and we thank you re-focusing the nation's attention on this issue. Our latest policy and its accompanying report (though not itself policy) is attached for your further examination.

Sincerely,

ROBERT D. EVANS.

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